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J. S. Terry

C

L I F E

OF

DAVID S. TERRY

PRESENTING AN AUTHENTIC, IMPARTIAL AND VIVID HISTORY

OF HIS

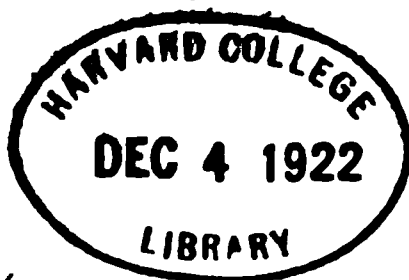
Eventful Life and Tragic Death.

COMPILED AND EDITED BY A. E. WAGSTAFF.

CONTINENTAL PUBLISHING COMPANY,
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1892

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TO ALL WHOM IT MAY CONCERN—

I hereby authorize A. E. Wagstaff to collate, edit, and publish the biography of my father, Hon. David S. Terry, and any favors you can extend to him will be highly appreciated by me.

C. H. TERRY.

San Francisco, June 2, 1891.

PREFACE.

IN presenting this work to the public the publishers have no apologies to make for the absence of details that usually enter into biography. The limits of an ordinary volume are too meager where so many thrilling events of history surround the life of the individual subject. His was one of the lives which combined both history and tragedy, with a vein of romantic heroism. It has been the object of the editor and compiler to present to the reader the simple facts, and we have been warned at each step in the progress of the work that condensation must be observed, so voluminous has been the material presented, both from the public records and from private sources. We have been compelled to sift this vast amount of material in order to condense the largest amount of the truths of history into the smallest space. It is probably true that no individual in California has occupied as much space in the public prints during a period of twenty years as the subject of this sketch.

We have taken him from his childhood home in Kentucky, where his youthful environments had much to do in moulding his character, and have followed him carefully in his adventures in the war for Texan independence when a mere lad; in his career as a common soldier in the war with Mexico; through the stirring incidents of his life in California, where he won honor, fame and notoriety by virtue of his determined spirit and peculiar passions; through the turbulent times when the Vigilance Committee of San Francisco was in vogue; his eminent services as an associate and chief justice of the Supreme Court of the State of California; his duel with Hon. David C. Broderick; his devotion to the associa-

PREFACE.

tions of his youth as a soldier and officer in the Confederate army during the Civil War; his quiet professional labors as a lawyer during a term of years following the close of the war; his earnest and arduous work while a member of the Constitutional Convention of 1879; his unfortunate association with plaintiff in the celebrated Hill-Sharon divorce case, which eventually led to his assassination.

History and biography are necessarily interwoven in this book. The two are arbitrarily combined, as is the result of facts, and not an incident is presented that is not verified in the story of the times in which he lived, every word of which can be substantiated by the living of to-day. As an authentic and unprejudiced work the publishers present it to the critical analysis of the public, confident that it will meet the test and be fully appreciated.

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INTRODUCTION.

IN introducing this work to the public, the editor takes the privilege of entering into and presenting some thoughts which have no place in the body of the book, or in the biography of the individual. It was with some degree of difficulty that certain strong prejudices arising from less recent transactions could be dispensed with in the development of a character that furnished so many contradictions, and until a full and complete research was had of the incidents in the life of the man, and the causes which led up to them were fully understood and analyzed, deliberate and calm deductions could not be drawn and impartial justice meted out. Men are usually judged solely by the reputations they have made in the exercise of their reserved activities, which become notorious from the fact that they are seldom exercised. It is true that the irrepressible temper which made Judge Terry notorious only actuated him at times when great occasions were met and the eyes of the world were upon him. The very few incidents in which his evil genius mastered him have become historical, with the popular verdict adverse to his good name. In a term of life spanning threescore years and seven he was judged by the evil instead of the good which he did. This is human nature.

The writer does not expect to meet with universal approval in many of his deductions, from the fact that, laying aside and ignoring an educated public sentiment, he has presented the facts of history as found in the public records, and gleaned from the living such incidents as marked the career of the man. In doing so, that history which has been recorded by the pen of prejudice, and the public sentiment which has obtained a large hold upon the people, must necessarily be reversed. There have been incidents in the life of ex-Judge David S. Terry of a shocking character, wherein he was the violent defender, and wherein no excuse can be offered and no charity extended. His evil temper was a disease which was implanted in him as a natural inheritance, and one which his nobler nature was unable to control. Judging from the notoriety which attached to his name, it would be supposed by a superficial observer that violence was the rule and prudence the exception in his life, but when history fails to record but three acts of violence in a long life, there must be some serious mistakes for which the public necessarily stand condemned.

There are forces in nature which are rarely met with, and when confronted cannot be fully understood. The elements which seem to have combined in forming the character of David S. Terry, in physical, mental, and moral construction, were at war with each other in the beginning, and each being strong, they could not blend into one harmonious whole. His robust frame was actuated by a strong mental force, imbued with high resolves in the line of honesty and integrity, while his moral and spiritual were devoid of superstition and

were allowed to moulder in the absence of sufficient exercise, although capable of being educated to grand achievements.

Cradled in the midst of the most violent turmoils and dissensions on the Texas frontier, without the counsel of a mother or the example of a father to guide and direct, his character was moulded in a tempest, and, although his environments were such as to implant in his youthful mind the most reckless ideas, he yielded in no manner to the licentious proceedings of his associates. He was never known to engage in any of the intemperate habits of those around him. Drinking and gambling were obnoxious to him, and in the midst of a carnival of crime he preserved his honor and integrity. Perhaps he was too particular on this point and evolved the idea that these virtues were wards of the physical powers, and were to be protected and defended by rash acts of bravery. The manner in which he guarded and protected them in after years from assault was evidence that he had not been properly taught, or rather, that he had not been taught at all.

His first exhibition of a violent temper, and the most unfortunate one in his life, from the fact that it indexed his character as a rash man, was one which was the result of his high regard for law and order. In his attempt, in the presence of an unlawfully-organized revolt against fraud and corruption in San Francisco, to impress his views upon the public by his presence as the embodiment of the law by virtue of his official position as an Associate Justice of the Supreme Court of the State of California, he inflicted a wound upon an officer of the celebrated Vigilance Committee, and became a prisoner in the hands of that organization.

The editor has been extended the privilege of making extracts from a political history written and published by a literary gentleman who was a contemporary of the men who form the central figures in this book. He was also one of the men who was deeply interested in and took part in the politics of the State during the exciting times of which he writes, and his story is one which has been pronounced correct by both factions. His history of the Gwin-Broderick fight for place and power and of the Broderick-Terry duel has received the sanction of both parties as the most fair and truthful account of that unfortunate affair that has ever been written. We have trespassed upon his liberality quite extensively rather than filch from him by expressing his ideas in language of our own. It has been found absolutely necessary to give a large portion of the lives of Gwin and Broderick in order to place the subject of this biography in the position in which he should be placed and present his character properly before the reader. We have examined other stories of this memorable conflict, but found them so tinctured with prejudice that the facts were wanting.

From the fact that David S. Terry never had any boyhood days there is no apology necessary for a lack of small incidents that so frequently embellish biographies. The little incidents that often serve as an index to the character of the man are lacking, but he furnished enough of the greater ones, tragic in their nature and tremendous in their results, to attract the attention of and interest the reader. His peculiar reticence has deprived the author and the reader of all the small embellishments that set the grave picture in

a gilded frame. In our research for these bright incidents of youth we have gleaned in a comparatively barren field. Almost at the outset we find him laying aside his school books and engaging in the strife, a soldier at the age of thirteen feeding upon Mexican gore, battling for a new republic. The stern realities of life crowded upon him and he became a hero in the conflict and grew to manhood in the midst of surroundings incident to pioneer civilization in Texas.

His advent into California following the close of the war with Mexico, in which he took a part, brought him in contact with new elements and new associates, and it is not for the purpose of defrauding the public into reading early history that we present in the following pages so much of the great political struggle in California. It is done in order to properly join the unities that led up to more astounding results. It would be doing an injustice to David S. Terry not to present the characters of both David C. Broderick and Wm. M. Gwin. It may not be accepted as a correct conclusion, but it is nevertheless true that they were directly responsible for all the ballot-box frauds and attending incidents that led to the formation of the celebrated Vigilance Committee of 1856. They instigated all the unlawful acts by their peculiar methods and manipulations in the struggle for seats in the United States Senate. The questionable characters who operated in the channels of crime were organized by them. No man ever found David S. Terry hobnobbing with criminals or working in the slimy depths of political sewers in order to reach official position.

For two reasons Terry was a terror to those who

pursued the devious roads to political distinction. He had the courage of his convictions and was as fearless as truth itself. His troubles with the Vigilance Committee and his duel with Broderick, coupled with the events which followed in making national history, served as millstones about his neck. The duel was the climax. It was precipitated at a time when extraordinary events were marching with rapid strides to a solution of the slavery question in the "irrepressible conflict." On any other occasion and at any other period more moderate judgment would have been exercised and a better understanding would have reversed the popular verdict. Among the many who have felt the injustice of public criticism was Hon. Joseph McKibben, one of Broderick's seconds, who still lives, and in behalf of justice writes: "The harshest kind of criticisms have been made on the management of the Broderick-Terry duel by the adherents of Mr. Broderick. Some men grossly misstated facts in order to win political capital. To question the scrupulous honor that characterized the whole affair is to grossly insult the principals and seconds. None of the gentlemen engaged would have tolerated for an instant the idea of unfairness." As one of the firmest and most consistent friends of Broderick, this statement from Mr. McKibben must be accepted above all others.

In his research for facts the writer came in contact with a staunch Republican—an old pioneer—who was one of the prominent politicians of that day, and who has occupied high positions of honor and trust in California. When told that the object was to present nothing but the facts of history and to ignore all stories

based upon prejudice to fit the sentiments of any social or political faction, he said:—

“When the true history of the life of Judge Terry is written, if it ever can be, and it becomes public property, the author will have to seek an asylum in some more congenial atmosphere than the one in which Terry moved and had his being. He was, because of his peculiar disposition, his utter disgust for shams and frauds, his contempt for men who became corrupt in official positions, his exalted sense of honor and integrity, his chivalry and energy in defending right and justice, the least understood and appreciated and by all odds the best abused man that ever stood erect and breathed the air of California. He was an intellectual Jove and a physical Atlas, who stood shoulder to shoulder and head erect above those among whom he moved.”

It developed in our research that Judge Terry was, in some manner, interested with Wm. M. Gwin in the Sonora colonization scheme. His presence in Mexico with a large number of his Confederate soldiers at the close of the war, and the fact that there were confidential communications passing between them, leaves no doubt that there was some understanding, but Terry has left nothing that will confirm the fact. That he was there for some such purpose there can be no doubt as one letter written by Gwin on taking leave of Mexico would indicate. The story that Gwin was seeking a ducal coronet and working to subvert the empire of Maximilian exploded the enterprise, and Terry remained. He never permitted his lips or his pen to betray him, hoping a more mild diplomacy

would obtain whereby he might become a Cincinnatus in the development of the rich country. He was an acute observer, and next to a judge a splendid diplomat. He seldom imparted knowledge. All his plans and purposes in life were closely guarded in self. He never contributed to the world anything of a literary character beyond that which his official duties demanded, but his checkered career, in which the exercise of his peculiar faculties was manifested, has provided a fountain from which volumes may be drawn. His mistakes stand out boldly from the fact that they were committed in astonishing attitudes, and while but few in number they were far-reaching in results, overshadowing all his more excellent qualities.

Judge Terry always impressed those not intimately acquainted with him with a sense of imperturbable coldness, which impressed the observer with a feeling that he was not a generous man. He was perfectly unassuming, and there was in him no exhibition of pride or ostentation. His principal characteristic was integrity, and he was actuated in all his methods by that rare quality which we call common sense. There was no enthusiasm or poetry in his nature and no eloquence in his speech. He was a plain, blunt man, and would seldom apologize for a bluntness that might offend a sensitive nature. Without rhetorical embellishment, his utterances were sententious. In his efforts at the bar he always impressed his hearers with that feeling of honesty which was convincing. His nature was stoical to a great degree. In one of his professional encounters with an attorney, his adversary drew a pistol and threatened to kill him.

Terry coolly walked up to him and holding out his hand said: "Give me that instrument." The attorney handed him the pistol without a word and quietly walked away. His utter fearlessness was a commanding power.

If the reader will be moderate and fair in exercising his judgment after reading the facts connected with the life of Judge Terry as they are presented in this book, and close his ears to the voice of prejudice, which has been the foundation-stone of his former adverse opinion, he will not fail to arrive at a fair estimate of his character. True, he will find something to condemn, for no one can justify his acts of violence in some instances where provocations were so trivial. His extraordinary breach of respect in the presence of the United States Circuit Court was the most flagrant exhibition of lack of dignity and respect of self of which he was ever guilty, but it was in keeping with his chivalric nature. No such act of defiance would have occurred in consequence of an adverse decision of the court had he been alone. All who knew Judge Terry would resent such a charge, and even as it was no one outside of long range newspapers unacquainted with the facts, has ever made such a charge, but they would not deny that he was led into the error by the plaintiff, who was his wife, and that it was she for whom he disgraced himself and laid the foundation of the death which came upon him in such tragic form and with such violence at Lathrop. From that day a cloud overshadowed him. There was not an admirer of his genius as an attorney and his ability and integrity as a judge but saw and realized that his unfor-

fortunate second marriage robbed him of society and brought him to an untimely death. In her defense he was sent to prison for contempt, and in his desire for vengeance and to inflict humiliation upon the judge who overstepped the bounds of custom and precedent in inflicting undue punishment, he was assassinated. The evidence is complete that the act was premeditated, and his notoriety as a fearless, brave and dangerous man, shielded the authorities from the measure of punishment deserved.

There seems to be no responsibility attached to the killing of Judge Terry. The verdict of the jury was not suicide. There was at least a strong suspicion based upon evidence that Justice Field's life was in danger. This evidence was of a character to cause the authorities to provide against an attack. There seems to have been no care as to Judge Terry's life. Ordinarily when one person threatens the life of another, or to do him bodily injury, the machinery of the law is put in operation to bar the execution of the threat. The person so threatening is placed under bonds placing upon him all the responsibility. In the absence of such proceeding and the fact that the attack was made and led to the death of Judge Terry, someone has guilt upon his soul, and no hired instrument is responsible. Field is said to have objected to any measures being taken to protect him. The Attorney General of the United States acknowledges to have made the order, and his explanation does not give satisfaction. It may not have the exact resemblance of a conspiracy, but the omission to take lawful and necessary steps in the face of the evidence to prevent the com-

mission of a threatened crime must be submitted to the public for their decision as to the criminal.

The high court of impeachment, known as the public, whose verdict has been sounded through the public press, has presented an anomaly in conclusions, showing the transitions that take place in the evolutions from struggling poverty and incorruptible infancy to power, wealth and corruption. Not less than a thousand pens have chronicled the sentiment that "Judge Terry was a relic of that stage of civilization from which it was assumed that California had emerged. That he was a product of the earlier and more violent days." There is grim irony in this expression when comparisons are made. He was a product of earlier days, and his life testifies to that fact. He was a reminiscence of the times when public officers were selected from the roll of honorable citizens; when United States senators and members of Congress were conspicuous for ability and integrity, and when such positions were not purchased with gold; when judges were chosen for their incorruptibility and exalted sense of justice. He had seen fit, in the process of the transition from innocence and moral rectitude to that of intrigue and moral turpitude in the strides of a "higher civilization," to preserve his honor and integrity, and, in his fearlessness, to make war upon the encroachments of that foe to freedom and liberty which was usurping justice in high places.

The San Francisco *Examiner*, a newspaper that aided so strongly in fanning the flame of revenge in Judge Terry's breast while he was in the Alameda county jail, made the following assertion after his death:

“He was one who, long before this, if even-handed justice had been meted out, would have suffered on the gallows a fit punishment for his acts.”

There is recorded an instance in the history of the world in which an individual was put to death because he made bold to hold up the corruptions of those high in authority to public scorn and contempt. Justice Field testifies that Judge Terry had indulged in expressed doubts as to the purity of judges, juries and officials generally. It was unpopular to do so, but Judge Terry was addressing himself to a crowded house. In this he was the tribune of the people who were more timorous than he. His judicial mind could comprehend more clearly and his high position attracted more readily. The people believed as he did, but their voices were not heard. Men do not relish disclosures of their corrupt practices, but they are too cowardly to battle against the truth. He was so panoplied that he could afford to criticise, as he did not live in a glass house. The “higher civilization” had made it very unpopular to tell the truth if it touched the besmirched robes of official majesty. An honest citizen was more respected in his eyes than one in power upon whom suspicion rested.

If this is the stride civilization has made since the “more violent days” of which Judge Terry was a relic, would it not be well to close the public schools, raze the churches to the ground, demolish the family altars, repeal all wholesome laws, open the dens of vice and crime, license political pawnshops, put candidates for office on the auction block, put the itching palms of judges behind their backs, enslave the poor and needy

and give the devil full sway? It requires political and social convulsions to change established conditions. These eruptions are called "advancing civilization." Plethora, whether in population or wealth, leads to corruption, and these are the conditions that confront humanity in all stages of the world's progress.

This "relic of an extinct civilization" has been removed, and the gladsome echoes have been sounded from shore to shore. The stern and relentless advocate of the people's cause has been sent to his grave unattended by the pomp and parade of dignitaries who camp on the trail of popularity and lead the van of a "higher civilization." The name of David S. Terry, with his "bristles and claws," will not disturb the repose of his enemies longer, but in the search for dark spots of corruption and dishonor to his name the lens of scrutiny will never disclose the faintest trace. The Supreme Court of the State of California, sitting on the pedestal of a "higher civilization," bowed to the gods that have been set up by the political pawnshops in subjugation when it refused to recognize the services of the man who gave it dignity and preserved its integrity in the days when the "remote civilization" was wrestling with the flood of the new which finally overwhelmed it. That was a grandly ignoble act.

The time may never come when the truth will arise superior to the flood of condemnation that has clouded the true character of Judge Terry, but in the field of research the writer of this biography has failed to find one fact to establish the reputation that has attached to the name of the subject, and which has overshadowed him. He was a man whose impulses were for

right and justice, and his aims in life were of the most honorable. The evidences of nobility and grandeur have accumulated, and what was at the beginning a dark and disagreeable character, where condemnation must necessarily be indulged in as gauged by popular clamor and distorted stories, has developed into one of extraordinary sublimity, marred only at isolated stages by the exercise of a quality as astonishing in its development as his nobler attributes were surprisingly grand. We are astonished at the record as it has stood for almost forty years, for we find it based upon falsehood and fashioned by his enemies to suit the sentiments that were popular and prevailed at that time.

This book was not written to conform to public opinion but in the interest of justice as presented by the facts. Whatever criticisms may be called forth by the views here taken must be gauged by the facts presented. No cynic need ply his avocation, for the records will put his egotism to shame.

THE EDITOR.

CHAPTER I.

CALIFORNIA AS AN INVITING FIELD—DEVELOPMENT OF CHARACTER—THE OBJECT OF THE BIOGRAPHER—PUBLIC CRITICISM.

During the few years following the conquest of California and the excitement produced by the discovery of gold, the horde of wealth seekers who came to the territory was marvelous in numbers and development in the various fields of industry was rapid. There is no incentive that has such a magnetic power as gold, and there is no nation under the sun, no matter what the habits and traditions, whose people are not impelled by a desire for wealth to such an extent that they will forsake their established avocations and associations to secure that precious commodity which, when once obtained, commands respect and has become such a power in the world. The Pacific Coast was the scene of intense excitement and activity. The influx of gold seekers was general from all quarters of the globe. Each one came inspired with great expectations, and all were infused with the hope that they would better their conditions. The young and the old, men of all trades and professions (except the gambler and thief), came to dig for gold, leaving their legitimate affairs behind for the time to be resumed when fortune favored them with their quota of her fabulous wealth. It was an enchantment which allured with the brightest antic-

ipations, and they were not disenchanted until they realized, as many did by sad experience, that to succeed required labor, patience and endurance; that even in the presence of vast treasures there were disappointments.

As population increased and society began to assume definite shape, business and professional men were seen drifting into their legitimate avocations. In this adjusting process necessary to establish communities for self-preservation and protection, but few professional men were found handling the miner's implements. It became a field for speculation and trade. As the prospects unfolded the future of the new State became bright.

None but men of energy and enterprise ever venture upon new fields so distant and isolated from home and established social centers. It matters not what their past histories may have been or their former conditions, ambition led them to the wilds of the modern Ophir, and they came nerved with a hope of reward. Even the criminal, fleeing from himself and from the law, found an asylum in the midst of this heterogeneous mass of humanity where people were so intensely absorbed in the one prevailing thought of wealth. While some were not over-honorable in their methods those who proved themselves worthy became the objects of more than ordinary interest, particularly politicians, without whom the world would become a tranquil paradise—a haven of perpetual bliss.

Among those who came to California in early times, endowed with intellectual ability and physical energy, was the subject of this biography. He had inherited a disposition which isolated him from that vast multi-

tude who make up the ordinary array of genial companions, but he was arbitrarily imbued with an exalted sense of honesty and integrity. His tall stature and broad shoulders coupled with his extraordinary will power, plainly indicated that he was a splendid type of the man who roughly elbows his way through life, and his chivalric nature was a correct index to the fact that he was destined to make history. It was not to be the history of the great philanthropist whose energies were engaged in perfecting some grand scheme for the amelioration of mankind, nor that of the poet whose divine pathos in the harmony of verse and rhythm has touched the chords of sympathy and caused the hearts of all mankind to vibrate with feelings of universal brotherhood. Such individuals may have furnished material for the biographer without having had contention with the elements that combat the spirit of repose, but extraordinary characters are only developed in the fierce crucible of experience with malignant forces that confront them in the pursuit of the goal of a worthy ambition, striving to subdue the inherent passions that actuate self. Without the dark shadowing no picture can be painted, and the darker the shadows the more intensely striking the portrait. The most obstinate foe to man is the evil spirit he possesses, and without the utmost exertion and the most severe discipline it cannot be overcome.

Biographers usually betray public confidence by drifting into the rut of fulsome eulogists, no matter what the records present or estimate the public may have placed upon the character of the individual they assay to place upon the pages of history. In present-

ing the character of David S. Terry the writer must necessarily confine himself to the facts. They will furnish the best eulogy. Without conflicts with the world no man can have a place in history. It is the genius that overcomes obstacles at war with nobility that makes the hero. The standard set up may not be acceptable, but nature makes no mistakes in her imprint. Probably no single individual in California has commanded a greater share of public notoriety and attracted a larger amount of attention than the subject of this book. In a large degree that which has been presented to the public only serves to show the dark shadows of an eventful life—such shadows as follow in the trend of errors and mistakes, which are incident to all men, but which become the more obnoxious because of the eminence and peculiar characteristics of the man among men. It is only history repeated. It shocks the moral sensibilities to hear a preacher of the gospel resort to profanity, and when he yields to the lusts of the flesh he becomes more noted and condemned for a single error than credit for all the words of eloquence drawn from inspiration that he may be eminently qualified to utter in the sacred desk.

The severe criticisms that have been passed upon the acts of Judge Terry have warned the writer to be very careful in preparing and presenting the various incidents that have transpired in making him conspicuous as a subject of biography. It has been intimated that if anything meritorious should be discovered in the research, policy would suggest that it be lightly touched or entirely suppressed. As that sort of policy has been exercised absolutely heretofore, it is not a

quality which the writer of this knows how to handle in presenting the life and character of a man of so much ability and prominence. The sole object will be to follow the injunction of Shakespeare when he makes Othello say : " Speak of me as I am ; present an unvarnished tale ; nothing extenuate, nor set down aught in malice," and in doing so only those who have nursed and cultivated a deep-seated prejudice will condemn. Before rendering a verdict let each one read the story. It has never before been presented to the public in detail, and owing to the peculiar reticence of the man there may be chapters of the brighter side that sleep, and will sleep forever in oblivion. Those of the darker side have not been allowed to slumber.

CHAPTER II.

HIS BIRTH—HIS ANCESTORS—THEIR DISTINGUISHED SERVICES IN THE REVOLUTIONARY WAR—HIS MATERNAL GRANDFATHER, DAVID SMITH, AND GENERAL JACKSON—HIS IMMEDIATE FAMILY.

David Smith Terry was born in Christian (now Todd) County, Kentucky, on the 8th day of March, 1823. His grandfather, Nathaniel Terry, was a native of north Ireland, and came to this country prior to the struggle for independence, settling in Virginia. He took an active part in behalf of the colonies and was a Colonel commanding a regiment, taking part in all the great battles of the Revolution. He was a prisoner in the hands of the English, and was confined for many months in the Charleston prison. He was particularly conspicuous at Yorktown, and was present at the surrender of Cornwallis. Of his immediate family there is no record beyond the fact that he left a son, named Clinton Terry, who was the father of David S.

His maternal grandfather was David Smith, for whom he was named, and who seems to have been a man of remarkable force of character. Of him much might be written. He was a Scotchman, and when a young man he followed the fortunes of Charles Edward, the Pretender, who met his fate at the battle of Culloden. When the fortunes of Charles went down in defeat and his forces were threatened with annihila-

tion, young Smith escaped, boarded a vessel in disguise, and came to America, settling in Virginia in 1746. He united with the colonial forces that revolted against the tyranny of England and fought until the close of the Revolution with determined courage and bravery, and retired as a Colonel at the close of the war. He left a son, David Smith, who was also distinguished for the services he rendered the government in the War of 1812. He was an officer under General Jackson at New Orleans and during the Creek War in Florida, and came within the circle of Jackson's confidential friends and counselors, being rewarded with an official position of honor and trust. He was a man of large proportions, and resembled David S. Terry, both in physical stature and in his features. He had two sisters, one of whom married Clinton Terry, the father of David S., and the other Hiram Runnels, a prominent citizen of Mississippi, and once Governor of that State.

After his marriage, Clinton Terry made his home in Kentucky and was extensively engaged in cotton planting. Here his two oldest sons were born—Benjamin Franklin and David Smith. He was a man of average fortune, as fortunes were counted in those days; and operated upon an extensive scale; but a more favorable opportunity for raising cotton was presented farther south, and in 1824 he moved to Hinds County, Mississippi, where he purchased a large plantation, and cultivated successfully for ten years, during which time two other sons were born, named respectively Aurelius J. and Clinton. Here he contracted habits which led to a separation from his wife in 1835, and Mrs. Terry, who

was a woman of rare qualities of mind and great fortitude, took the children and moved to Texas the same year in hopes of retrieving the losses in fortune sustained through the mismanagement of business affairs. Mr. Terry returned to Kentucky, and after his wife's death, married again. He died in 1876, leaving a large family, the fruits of his second marriage.

Benjamin Franklin Terry, the oldest son, was a brave and impetuous officer in the Confederate army, and was killed at the head of his regiment, of which he was Colonel, while leading a charge at the battle of Green River, near Bowling Green, Kentucky. Clinton, the youngest of the four brothers, was an eminent attorney, and was intrusted with large interests during the war. While on his way to Richmond on business in the winter of 1862, he joined General Wharton, who commanded a division of cavalry in the Confederate army, a few days before the battle of Shiloh. General Wharton permitted him to accompany him as he expressed a desire to witness a battle, which was then imminent. He was killed during the first day's engagement.

CHAPTER III.

TERRY'S LIFE IN TEXAS—EXCITING TIMES AND EVENTS
IN THE STRUGGLE FOR INDEPENDENCE AND A RE-
PUBLIC—THE MASSACRES AT THE ALAMO AND
GOLIAD—BATTLE OF SAN JACINTO—INDEPEND-
ENCE SECURED.

Mrs. Terry, with her four sons, settled upon a large plantation on Oyster Creek, twenty-five miles west of Houston, and began cotton raising on a large scale. As her oldest son was only fifteen years of age, she took the management of affairs in her own hands, and performed other duties of a domestic nature which she found very arduous. Her children had received only such an education as had been provided by the public schools of Mississippi, which was very limited. The burdens she had assumed were too great, and the following year (1836) she died, leaving the care and responsibilities of the large plantation to Frank, as he was called, and David. They were both large of their age, and were endowed with more than ordinary abilities and courage. The worst feature that confronted them was a social one. At that time the territory of Texas was in dispute. A conflict was going on between the people who had flocked in from the United States, who called themselves Texans, and the Mexicans for possession. During the influx, a horde of criminals had sought refuge from justice in the dis-

puted territory, and they were more to be feared than the natural enemy. A desperate colony of these criminals had settled near Austin and formed themselves into a band of "Regulators" to aid the guerillas in obstructing immigration from the United States. Their operations were very extensive, and when united with the Mexicans as allies they became inhuman and fiendish. Notwithstanding this, large numbers of the better class of people from the Southern and Western States settled in the eastern and northern portion of the country, adding security to both lives and property. The people of Texas had organized a provisional government, with General James Austin as President. The military forces were commanded by General Sam Houston, Colonel W. B. Travis and Colonel Fannin—Travis in the southwest, Houston, as the commanding general under Austin, in the central portion of the territory, and Colonel Fannin in the east.

In February, 1836, the forces under Colonel Travis, one hundred and forty in number, among whom were Colonel Davy Crockett and Colonel James Bowie, occupied the Alamo on the San Antonio River, and fortified it, expecting an attack from the Mexicans under General Almonte. Santa Ana, who had assumed the dictatorship in Mexico, had become inhumanly reckless, and proposed to wage a war of extermination. Almonte appeared on the 20th day of February with two thousand Mexican regulars and demanded the surrender of the fort, which was refused. The bombardment commenced, and determined charges were made, all of which were success-

fully resisted by the Texans, and the siege was kept up for two weeks. The Texans had but two small cannon, were almost naked for clothing and famishing for food. Every effort was made to secure assistance. Thirty-two recruits, without arms and without food, had succeeded in gaining admittance. Their ammunition gave out, and they determined to cut their way through the Mexican lines and escape. This bold action was attempted on the 6th of March, but they were overpowered, and those not killed in the attempt were afterwards shot by order of Santa Ana, their bodies mutilated, piled up and burned. It is unnecessary to repeat the history of this inhuman butchery. "The massacre at the Alamo" became an inspiring watchword for the Texan forces forever after. A few days later, March 27, Colonel Fannin, who had been ordered by Houston to join him, while on the march near Goliad with six hundred men, was confronted by General Urrea with five thousand Mexicans. After a two days' engagement, Fannin capitulated under promise of humane treatment, with the understanding that his men should be sent to the United States, but Santa Ana ordered three hundred and fifty-seven of the prisoners shot in cold blood.

It required time in those days for the news to be communicated to the sparsely-settled portions of the territory, but when the people were made aware of it, they were imbued with a spirit of revenge. At this time David S. Terry was a lad only thirteen years old, but he was large, strong and brave. He immediately left his brother, his books and the plantation, and joined the Texan forces who were marshaling under

Houston's banner and joined him at Gonzales, where he was encamped with only three hundred men. Santa Ana with four thousand men had been marching through the territory, burning towns and devastating the country, and, being flushed with success, was in search of Houston and his men. Knowing all this, Houston concluded to fall back, hoping to divide and scatter the Mexican forces, which proved successful to the extent that, when arriving at San Jacinto, Santa Ana had only sixteen hundred men. By this time Houston had received re-inforcements until his forces now numbered six hundred, and he prepared to attack the Mexicans then and there. Here the most memorable battle that ever took place on the American continent was fought, and the grandest victory achieved, considering the numerical strength of the combatants and the results. Of the Mexican army six hundred and thirty were killed, two hundred and eight wounded, and seven hundred and thirty taken prisoner. Of the Texans only eight were killed and twenty wounded. The 'Texans' battle cry was, "Remember the Alamo—remember Goliad!" and this inspiring slogan was worth a thousand men. They fought with their guns as clubs and their bowie knives, as they had no bayonets. Here young Terry was conspicuous for his bravery. A Mexican officer struck him on the head with a saber, inflicting a scalp wound, and was rewarded with a bowie knife which pierced his heart. Santa Ana was taken prisoner, and was compelled to sign a treaty granting independence to Texas.

BATTLE OF SAN JACINTO, WHERE GARRA, A BOY OF 13 YEARS



CHAPTER IV.

TERRY BECOMES A STUDENT AT LAW—HIS APPARENT
LACK OF INDUSTRY—ADMITTED TO THE BAR—
DEVELOPMENT OF HIS PECULIAR CHARACTERISTICS
FOR HONESTY AND INTEGRITY—SERVICES IN THE
MEXICAN WAR.

The war being ended and peace restored, young Terry returned home and remained quietly until 1841, when he entered the law office of Colonel Hadley, in Houston. Hadley was his uncle, and took considerable interest in his pupil. Terry was an industrious student. From childhood he had exhibited a peculiarly taciturn disposition, seldom engaging in any of the amusements common among young men of his day. When questions of importance were introduced as subjects of conversation or discussion, and particularly where legal points were involved, he was an agreeable and interesting companion. His perceptor, Colonel Hadley, often remarked that Dave Terry seldom studied, but gained his knowledge by absorption, like a sponge. He was not bright, but deep, and possessed a remarkable memory. He was not quarrelsome, never offered an insult to anyone, but was prompt to resent one when offered. He never indulged in any of the vices prevalent at that day, being exceedingly abstemious, and seldom wasting his time at card playing,

which was the social recreation indulged in by men both young and old. He made such rapid progress that he was admitted to practice within two years after entering upon his studies. In relating the incident of his examination upon being admitted to practice he gave a version, the truth of which is vouched for by others, and is very amusing. Three attorneys were appointed to make the usual examination, and at the appointed time they took their seats around a table. The oldest member of the committee adjusted his spectacles on his forehead, and, with a solemn and serious expression on his countenance, intending to impress Terry with the most grave magnitude of the ordeal through which he was about to pass, said:—

“Young man, do you know the price of a dish of oysters?”

Terry, with that coolness which was one of his prominent characteristics, replied that he did.

“In order, therefore, to test the correctness of your judgment and legal acumen,” said the spokesman, “I move we adjourn.”

The motion was carried, and the committee repaired to a restaurant and partook of refreshments at Terry's expense. He was accordingly granted a diploma setting forth his legal abilities, high moral character and patriotic devotion to country.

After being admitted to the bar he, in connection with Colonel Hadley, opened an office in Galveston. One of the first cases brought to him was of such a character that he positively refused to have anything to do with it, and his action in that instance was an index to his high regard for integrity. It was one in

which a rich planter of Louisiana attempted by a legal quibble to dispossess a widow of two thousand acres of land. He was offered a large fee, but he was in possession of all the facts, and knew the widow had purchased the property in good faith, and although there was a cloud on the title and the case was one which would require but little effort to win, he knew it was wrong. Having been made acquainted with the fact by Mr. Benjamin, the planter, he would not take issue on the other side, but he engaged another attorney to take the case and secure a clear title to the widow.

Galveston at this time was the principal port of entry for the Texas republic. Here he became acquainted with Major Rhodes, then United States Consul. He was the father of William Rhodes, whose brilliant career as a writer over the signature of "Caxton" in California, attracted attention and won him notoriety. Mrs. Mary Rhodes, wife of the Consul, was one of the most brilliant, entertaining and fascinating women of that section of the country. She was a great friend of Judge Terry until his second marriage. She is now living in San Francisco, and still retains her wonderful fund of intelligence and brilliant conversational powers, although eighty-three years of age. Much might be said of this woman, as she was intensely Southern in her opinions, and she employed her energies during the Civil War aiding the insurgents. Her son was a lieutenant in a North Carolina regiment and was killed at the battle of Gettysburg. Among the souvenirs which she prizes highly is a golden star worn by General R. E. Lee in his defense of Virginia.

During the political campaign of 1844, when the question of the annexation of Texas was the absorbing theme, there were some who doubted the propriety of the move, and among others Consul Rhodes. In a conversation with him on the subject Judge Terry said:—

“I am not sure but that annexation may injure the prosperity of Texas, but in this I may be mistaken. The commercial prospects are not very bright for an independent republic. If annexed, of course the United States will take possession of the harbors, and the business will be done through the central government at Washington. That will injure our prestige, but we will have the power and strength of that government behind us, and Mexico will not again attempt a war of subjugation. Considering the feeble condition of our finances, my private opinion is that annexation is preferable in the main.”

Terry was an old-line Whig. He loved “Old Hickory” for his dash and independence, and in return for the friendship he had for his grandfather, David Smith, and the confidence he had reposed in him. While he did not admire James K. Polk so much, he was opposed to Henry Clay on account of his compromising spirit. He supported the administration of Polk more as a political necessity than for any confidence he had in the man. Houston was an absolute annexationist and an honest man, and for this Terry liked him. He could march under the banner of the hero of San Jacinto and become enthusiastic. He would have been proud to remain a citizen of an independent republic which he had fought to establish, but the United States was a much grander republic.

While in Galveston attending court on one occasion an episode occurred, which is noted here as an index to a prominent phase of his character. He was boarding at a house kept by a young widow, and an itinerant phrenologist was lecturing at one of the public halls. One evening Terry accompanied his landlady to the entertainment. The lecturer's name was Crane, with the prefix of professor. After the professor had finished his lecture and had examined the heads of several persons by request of the audience, creating considerable amusement, he stepped up to young Terry voluntarily, put his hand on his head, and in a jocular manner said:—

“Now, here is a jim-a-long-josey, rollicking sort of a fellow.”

The audience went wild over the remark, but not one had dared to suggest an examination of his head, knowing his dignified and stern nature. Terry did not say a word, but he very quietly and courteously took his lady home and immediately returned and gave the professor a whipping. After this no one dared to take any liberties with him. Although full of life, energy and ambition he never indulged in any levity. He was not born under a merry star, but was always apparently engaged in deep thought as though solving some intricate problem. He mingled with men of riper years, gathering what knowledge he could from the more experienced of his associates. After he had studied law he made that his business, and although a young man, he was considered a force and power at the bar, and his success was phenomenal. His older brother Frank was altogether a different character;

being genial and affable, full of push and enterprise, he brought, through his energies, a large amount of practice to the firm. He was always managing some large enterprise, and seemed possessed of a peculiar faculty which attracted the attention of men of prominence. His public services in the building of railroads and other services to the State gave him a power which led him to fortune and fame.

In 1846, when the war between the United States and Mexico was inaugurated as a result of the annexation of Texas, Terry was one of the first to enlist. The time of enlistment was for three months, and the Texan Rangers, among whom he was enrolled, were slow in getting to the front, owing to the tardy action of the government in accepting troops. General Taylor had occupied Matamoras, fought the battles of Palo Alto and Resaca de la Palma, and was encamped at Matamoras organizing for the battle of Monterey. Here the Rangers, under Colonel Wood, had assembled in a disorganized condition. When the companies were formed, Terry was chosen a lieutenant. Before leaving camp Colonel Wood was promoted, and Colonel May was placed in command. The troops moved to Monterey and the battle was fought on the 19th, 20th and 21st of September, 1846. Terry was in each day's engagement, as, in fact, were all the troops under Taylor, as he only had five thousand available troops and was confronted by General Ampudia with ten thousand regulars of the Mexican army. Here Terry's services ended, as the term for which he had enlisted had expired, and as the government would not receive any more recruits, he reluctantly returned

to his law practice, and for the following three years divided his time in conducting law cases and in visiting the scenes of his childhood in Mississippi. He had a neighborhood fame for a contempt of all dishonorable and questionable transactions, and the services he had rendered at the battle of San Jacinto and at Monterey, added to his other peculiar characteristics, had traveled in advance of his visit to Mississippi. His relatives there looked upon him as a youthful hero. He there made the acquaintance of the young lady who became his wife in time, the brief acquaintance then formed having ripened into a stronger tie during her residence in Texas with her uncle Hiram Runnels while Governor of the new State.

CHAPTER V.

PERSONAL DESCRIPTION—GENERAL CHARACTERISTICS —BECOMES A MEMBER OF THE MASONIC ORDER AT HOUSTON—RELIGIOUS SENTIMENTS.

Having followed the subject of this biography from the cradle to manhood, a description of his person will not be out of place. David S. Terry was six feet and three inches tall and weighed two hundred and twenty pounds. His hair was light brown, tinged with a sandy shade, and was brushed back, displaying a broad, high forehead. His brows were heavy, overshadowing a steel-gray eye that moved languidly, indicating an absence of nervousness, yet always on the alert. He wore heavy chin whiskers, which covered a broad chin, while his upper lip was always clean shaven, presenting a square mouth with lips compressed, evidences of the strongest determination and firmness. His head rested solidly upon square, broad shoulders with a short, thick neck. He was naturally reticent and morose, but when in conversation upon pleasant topics which interested him, a beam of intelligence would light up his countenance and he would become a very agreeable and interesting companion. His taciturn mind deprived his friends of a pleasure it would have been to them and to him in extending sympathy when occasions demanded. His troubles were his own, and he did not believe in burdening others with them, yet he

could be as tender as a child when the sorrows of others engaged his sympathies.

He was stern and inflexible in his opinions and unyielding in his purposes, but would allow no one to surpass him in exhibitions of social courtesy. The writer's brief acquaintance with him, extending over a period of only five years, was a source of study. At first it was as the murderer of Broderick, with all the prejudices that could be derived from the popular condemnation of that unfortunate affair. Next as the Confederate soldier, who had obliterated his fame as Chief Justice of the Supreme Court by taking up arms to destroy the Constitution and the Union he had sworn to support and defend. Then the witness came up testifying to his high character for honesty and integrity, which had never been impeached, and his love of truth gave emphasis to every expression with a fearlessness and frankness that put falsehood to blush. He was temperate in all things save that of a violent temper which he seemed powerless to control. His will power was sufficient for all else save that. He was able to avoid a life of licentiousness, solely through a sense of honor and dignity of character. He was liberally endowed with both physical and mental force, but his irrepressible temper on trying occasions brought him many troubles which the exercise of his better judgment might have avoided. His lack of conservatism and his dogmatic disposition stood between him and that eminence for which nature had fitted him in her lavish gift of intellectual powers and made him notorious instead.

Those who love to indulge in a study of the ideal

philosophy taught by believers in the doctrine of Theosophy, have faith in the reproduction of self in the ages to come in all the elements of nature, a physical, intellectual, moral and spiritual re-incarnation. In searching through the annals of history, seeking a reproduction of characters that have passed away in the centuries, there may be such evidences of transubstantiation animating the clay of to-day, but David S. Terry has no counterpart, no parallel in any human shape presented in history, save that of Caius Cassius, whose form was as colossal, whose temper was as fierce and uncontrollable, whose love of liberty was as great, whose friendships were as strong, and whose dagger found a sheath in the body of Cæsar. But here the likeness ends, for no man can charge Terry with a misappropriation of public funds as Brutus charged Cassius, and he had no nook or corner in his nature for jealousy.

It was unfortunate for David S. Terry to have matured while passing through the eventful and exciting scenes incident to border life in Texas, when the passions of men were unbridled, without a father's counsel and example and a mother's tenderness and admonitions. He was his own master and his own pilot through the turbulent waves of passion which always lead in the van and follow in the wake of political and social revolutions, and had as his companions, if any, men whose identities were obscure and problematical. But he inherited the chivalric blood of a brave Celtic ancestry, and his courage, coupled with an endowment of more than ordinary mental ability, served him well.

While in Texas he became a Mason, but whether he identified himself with the Order in California the writer has failed to ascertain. In his younger days he became a member of the Baptist denomination of Christians, and for a time was so radical and enthusiastic that many thought he would drift into the pulpit. At all events, he was so earnest and active that he became a leader and exhorter. From a brief memorandum which is still in existence in his own handwriting, the following, giving his views of the Bible, has been furnished by an old and valued friend:—

“There is more within the lids of the Bible than in all the books in the world put together. It has furnished a kernel for every subject worthy of study. Religion, history, philosophy, astronomy, law, ethnology—in fact, everything is blended harmoniously on its pages. The Creator of matter has, in its organization and development, put into it the energy of His spirit and the power of His love. The combination is wonderful, and an understanding of it is too abstruse for finite minds to conceive.”

With all this Judge Terry was in bondage to an evil spirit which he could not control, and which a later and more progressive civilization could not educate.

CHAPTER VI.

ADVENT INTO CALIFORNIA IN 1849—BATTLES WITH INDIANS WHILE CROSSING THE PLAINS—EXPERIENCE IN THE MINES—RETURNS TO HIS LAW PRACTICES—DEFEATED FOR MAYOR OF STOCKTON—A LUDICROUS AFFAIR.

Upon the announcement of the discovery of gold in California and the excitement which followed throughout the whole country, David S. Terry formed a small company of Texan Rangers, who had been his comrades in the Mexican War, and started for California, by way of New Mexico and Arizona. In crossing the plains they met bands of hostile Indians who disputed their passage. On two occasions they gave battle, and the Indians were severely punished. About fifty Indians were killed and wounded, while the Rangers only lost one man. When they arrived in California in December, 1849, the company disbanded. Terry stopped for a short time in Calaveras County and tried his hand at mining, but the results were not satisfactory, and he left the shovel and rocker and went to Stockton, where he opened a law office and was soon in the enjoyment of a good practice. He set himself about to study the legal phase of the new order of things, which he soon mastered, and as to the social phase, he had but little to learn, as society was in a

very chaotic state. The principles of justice, however, were as highly and rigidly observed, and he was comparatively at home at the bar. Justice was a little more stringent at that time, when a horse thief and kindred criminals had to suffer capital punishment.

During the same year the municipal election was held in Stockton, and he was induced by some of his friends and admirers to permit his name to go before the people as a candidate for mayor on the Whig ticket. His opponent on the Democratic ticket was Samuel Purdy. This was a new field for his genius, and that peculiar genius was lacking. He was placed in an extremely awkward position. Nature had deprived him of every element that goes to make up the successful politician. He could not solicit votes. He was too honorable to buy and too proud to beg, and of course he was defeated. The simple matter of defeat and the chagrin was the only regret he had, for, as he afterwards expressed himself, "Had I been elected I would not have known what to have done with the office. I would have made a poor mayor."

A very ludicrous affair occurred during 1850, which might not have proved so amusing had it not been for his exhibition of coolness and utter fearlessness under difficulties. He had never handled a rifle or pistol to any great extent, preferring the Texas mode of defense with the bowie knife. He was not a good shot with either, and he knew it. A man named Roberts, who claimed to be both lawyer and physician, came to Stockton from Mexico. He was a glib talker, and by his winning manners had succeeded in securing Terry's friendship, and Terry would fight for a friend

as quickly as he would for Terry. George S. Belt, a prominent merchant of Stockton at that time, became acquainted with the fact that Roberts was a horse thief, and had been a highway robber in Mexico, and Belt was not careful about making it public. Terry hearing the story, denounced it as a falsehood, and Belt challenged him to fight a duel, sending the challenge through a man named Henry Marshall. Terry accepted the challenge, and named D. W. Perley as his friend. Being the challenged party he claimed the right to choose the weapons and name the distance. He chose pistols and named the distance ten paces. To this Marshall objected, stating that the short distance was unprecedented, barbarous and murderous, but Terry was inflexible. W. F. Swasey, an old pioneer of 1844, who was acquainted with the *code duello*, was in Stockton at the time. The question was referred to him by Terry, Marshall and Perley. He decided that so long as the challenge remained Terry had the right to name the distance. On the ground selected the next morning, Marshall desired to reopen negotiations in relation to distance, offering to withdraw the challenge temporarily and without prejudice. He was informed that no other proposition would be entertained. The amusing part of it was Terry and Belt were both large, tall men, and at a distance of ten feet their pistols would almost touch. Swasey asked Terry why he insisted upon so short a distance. He replied: "Belt is a noted dead shot with either pistol or rifle. I am not an expert with either, and if he lacks nerve he is less liable to hit me at ten paces than at thirty paces, and I know I can hit him at ten paces." The challenge

was finally withdrawn. After this it was proven that Roberts was a horse thief and had been a highwayman, and Terry went to Belt, shook hands, and was ever after his firm friend. Belt, who was a fiery Southerner, was afterwards killed in a street fight at Stockton, and Marshall was shot dead by a man named McElroy at Sonora, Tuolumne County.

CHAPTER VII.

CONCLUDES HE IS NOT A POLITICIAN—PROFESSIONAL SUCCESS—A SUBJECT FOR LEGENDARY STORIES.

After his defeat for mayor of Stockton, Terry concluded to let politics alone and study men and the new order of things in the various fields of activity that presented such a motley phase of moral and social ethics. He was satisfied that his nature and education were not properly adjusted to such a condition, as he despised the sycophancy that must necessarily enter into the composition of the successful candidate. Accordingly he turned to his law books, formed a copartnership with D. W. Perley, and pursued his profession without dividing his time and attention with other matters. In this connection an incident is given by a gentleman who speaks through the *Denver Republican* of August 15, 1889. The reminiscence may be called legendary, as the story is not vouched for by any member of the Stockton bar, a few of whom still live who were professional contemporaries of David S. Terry. It is probably in keeping with a thousand other stories that have found place in the imagination of men who, through prejudice and fear of the man when alive, became maliciously and wickedly brave at his death. Of course the story is clothed in all the dark colors that a retired Bohemian could paint, and it is presented here only to divert the mind of the reader

in the character of an episode for relaxation of the mind absorbed in dwelling upon facts. Distant from the scene, and safe from danger, this newspaper correspondent presents this splendid falsehood as a funeral present to the murdered jurist:--

"It was in June, 1853, and at Stockton, in California, when the summer term of the District Court was to convene, that I first met the fire-eating Texan, then an attorney. The people of the country had elected Ben McCullough, also a fire-eater, as sheriff. Most of the lawyers sat with pistols in their belts, and the judge, as I remember, had a bowie knife.

"The first case was called by the court, the jury impaneled, and, while waiting for the next one on the calendar, I seated myself at the bar table, having business with the court myself.

"Just at this juncture in walked David S. Terry, a picturesque-looking individual. He was then a young man, about six feet high, and on this occasion he was without coat or cravat, and on his feet were slippers but no stockings. From under his vest protruded the identical dueling pistol with which, years afterward, he killed David C. Broderick. On his other hip opposite the pistol was a wicked-looking bowie knife. Terry, on taking his seat at the table, placed his foot on top of the same and commenced cross-questioning the witness. The witness was a consumptive-looking fellow. Said Terry: 'What's your name?' The poor fellow replied, in a feeble voice, 'Williams, sir.' 'Have you ever been indicted in this court?' 'Yes, sir; and you caused me to be indicted, but the indictment was nolle prossed.' 'What's that you say?'

said Terry. 'Answer my question and nothing else.' And thereupon the judge spoke and said, 'Confine your answer to the question, please;' and when Terry repeated the question poor Williams, strong even in death, repeated the answer, and thereupon Terry, jumping across the table, drew his bowie knife and rushing upon the poor, sick witness in the stand like an Apache Indian, cut away at the railing of the witness stand, and had he not been seized and grappled with by the judge and Ben McCullough would have cut the Yankee witness into mince-meat. During this scene the perspiration was running from Terry like water, and his disheveled hair, frothing mouth and gleaming knife presented the most extraordinary specimen of an advocate and counselor at law that I have ever met at the bar in my practice of fifty years."

Terry was a terror. In many instances truth becomes a terror, and in defending it the champion is often charged with terrorizing and loses caste among his fellows. The reader will pardon a reference to other statements made by the same writer which are given below, as it is absolutely refreshing to know how courageous some men can become after the cause of fear has been removed and placed beyond the power of defense. He speaks of Terry's "frenzied moods" as though he were a maniac. They were not moods, but outbursts of irrepressible anger caused by breaches of his self-constituted ideas of dignity and respect. These "frenzied moods" were, "like angels' visits, few and far between," and have been woven by industrious pens and tongues into the web of his life by the shuttle of political prejudice solely on account of his

duel with Broderick, who intended to kill Terry, and made his boasts that he would do so. In referring to this the writer says:—

“ Like Duke Gwin, he could brook no dispute, and the ever-ready pistol and handy bowie knife were his most potent and convincing arguments. From an humble attorney of the bar he became the supreme judge of the highest court in the State, and, while acting in this capacity, he performed that murderous deed which ever afterward consigned his name to everlasting infamy in the minds of all honorable men, the deliberate, premeditated murder of United States Senator David C. Broderick, in San Francisco, on September 20, 1859.”

As this history progresses the absurdity of such as the above will gradually disappear. Contemporaneous writers and verified documents will put such statements to the blush.

CHAPTER VIII.

MARRIED IN MISSISSIPPI, TO MISS CORNELIA RUNNELS
—A WOMAN OF RARE QUALITIES OF MIND AND
HEART—SETTLED IN STOCKTON—HIS FAMILY
RELATIONS—DISTRESSING INCIDENTS.

Miss Cornelia Runnels was the daughter of Harmon Runnels, a large cotton planter, who lived in Hinds County, Mississippi, six miles northeast of Jackson, on Pearl River. Hiram Runnels had married a Miss Smith, who was David S. Terry's aunt; and while Cornelia and David were not full cousins, the close connection between the families entered largely into their relationship in after life as husband and wife. Cornelia's father died when she was a child, and she became the ward of her uncle Hiram Runnels, who was twice a member of Congress, Governor of Mississippi, and later Governor of Texas. She was naturally a woman of great force of character, possessing a bright intellect, polished with a liberal education. Her brief acquaintance with David S. Terry, during her short stay in Texas, renewed by his visit to Mississippi in 1848, ripened into more than a mere cousinly regard, and, in 1852, having prospered in his profession, in a worldly sense, he went to Mississippi, and made her his wife. At that time Terry was twenty-seven years of age, and Miss

Runnels twenty-three. He immediately returned to Stockton with his wife, and her graceful deportment and refined manners soon attracted the attention of all with whom she came in contact. She exercised a wonderful influence over her husband, and directed her energies and her social standing to secure success to him in all his undertakings. One who was as a mother to her in California, in speaking of her said to the writer: "When she died her hand was in mine. I loved her next to my daughter, who died, and whose place she had taken in my heart. She was one of the sweetest, purest, and noblest of women. During her life she proved a heroine in her devotion, and she died a martyr in his behalf." During the few years following his marriage, he became a very changed man. He was attentive to business and devoted to his household, and grew largely in the estimation of those with whom he had formerly associated. His upward tendency in the social, as well as a professional, scale arrested the attention of men of influence.

He had no superiors at the bar in point of legal acumen. He was brief, terse, and logical in all his arguments; in fact, he was a bundle of logic and brevity. In time his cold, bruff manner of speaking became a part of his reputation, and not only ceased to be repulsive, but was actually pleasant to hear, charged as it was with legal value. He never courted praise or applause. Up to this time he had been the quiet, exemplary citizen, and had not displayed that irritability of temper which slumbered in his composition. On a few occasions he had exhibited a coolness and courage, and occasionally a petulancy, which

indicated that he was capable of taking care of himself in any emergency, but the supreme moment had not come to call forth the evil passions which clothed him as "a monster of hideous mien" in later days. His character was fully established as a man of honor and strict integrity, and on this foundation his reputation rested.

His first child, Frank, was born in 1853, and died when only seven months old. Samuel, the second son, was born in 1854. He was a promising young man, partaking largely of the attributes of his mother. He was educated at the college at Vacaville for a time, finishing his education at the Episcopal school at Benicia. He studied law, and was a prominent and prosperous member of the Stockton bar. In 1883 he was elected to the Assembly, and served with distinguished ability, being chairman of the Judiciary Committee. He was a favorite among his associates, and a prominent member of the organization of Native Sons. He died in April, 1884, aged thirty years. David S., the third son, born in 1856, was a bright boy, and resembled his father. He was a restless and unruly boy, and fond of outdoor amusements. At the age of seventeen years he accompanied a man, named Ben Lee, to spend a few months on the stock ranch of a Mr. Beal, near Tejon Pass, in Kern County. He was fond of hunting game, and took with him all the necessary arms and accoutrements. A few days after arriving at the ranch, he received a letter from his father, calling him home. While in his room preparing to return to Stockton, he accidentally let a pistol fall from his hand, and, in striking the floor, it

was discharged. The ball entered his breast, killing him instantly. This occurred in November, 1873, and was a serious blow to the family, as he was a young man of excellent mind and great promise.

Clinton H. Terry, the fourth son and only surviving member of the family, is a well-educated, bright, and gentlemanly young man. He studied engineering, and has been engaged for several years as chief of the San Joaquin River Navigation Company. He was engineer in the Mint at San Francisco during the administration of President Cleveland, and is now in the employ of the Upper Sacramento River Navigation Company. He is married and has a small family, who live in Oakland.

Two other sons were born, but died in infancy. His admiration for his oldest brother, Frank, caused him to name a second child for him, and the youngest was named for Jefferson Davis.

Many years have been passed over following his family and their fortunes, and, in noting such a trend of misfortunes and bereavements, the keen eye of prejudice, which always looks for some compensating disaster, has discovered in the strange incidents the avenger predestined by divine Providence to punish the father for alleged transgressions and violence. "The blood of Broderick and Hopkins is on his hands, and his offspring suffer for his crimes," has been uttered by the lips of believers in divine retribution. Such ghastly speculations are only indulged in by the superstitious, who drink copious draughts from the same source that imbues the Arabian prophet with an irrepressible impulse to make his annual pil-

grimage to the shrine at Mecca. It does violence to the civilization that has thrown back the sable curtain of the Dark Ages and stepped upon a new era of enlightenment, with mind educated by science, ennobled by the touch of art, and disenthralled by freedom and progression.

Returning now to the subject of the story, the reader's attention is called to the political triumph which came to David S. Terry by force of circumstances and without the unworthy efforts usually put forth by politicians.

CHAPTER IX.

POLITICS AND POLITICAL PARTIES—BRODERICK'S ADVENT INTO CALIFORNIA—BRODERICK AND GWIN—TERRY BECOMES A KNOW-NOTHING—DISGUSTED WITH THE BRODERICK AND GWIN METHODS.

In 1855 the political situation was vexatious to him. The existence of the two old parties was threatened by the encroachments of the Free Soil sentiment and the insidious workings of a secret political organization called "Know-Nothings." The old Whig party, to which he belonged, was becoming dismembered, and the Democratic party was hopelessly divided in California through the corrupt and questionable methods adopted by Gwin and Broderick in their warfare for a seat in the United States Senate. Terry was not a trimmer and stuffer. He believed that there was no dignity outside of an honest exposition of principles. If a man had not the courage of his convictions he would bear watching. The adoption of the Kansas-Nebraska bill in 1854 by Congress virtually repealed the Missouri Compromise of 1820. The American sentiment was spreading rapidly. Already the Know-Nothings had spread consternation among the leaders of both the old parties in the Eastern States in such volume as to predict a political revolution. The changes were so radical in many of the States that all

hopes of the Whig party surviving the attack upon its organization were lost, and the repeal of the Missouri Compromise was such a menace to slavery, in view of the approach of the Free Soil element, that Terry, who was an ultra Southern man, had no choice left but to ally himself with the Know-Nothing party, believing that it would take root in the principles of the pro-slavery sentiment and neutralize the radical feeling which threatened the peace and prosperity of the country by sectional divisions.

This was the condition of affairs in California when the State conventions of 1855 assembled to nominate candidates for office. Terry was not alone in his convictions. The better class of people, who had not made politics a trade, were of the same opinion, and when the Democrats met there was a stormy time in their convention. They could not adjust their differences, and the Gwin and Broderick elements split, and each nominated a ticket.

It will be necessary, in order to give the reader a clear conception of the causes which led up to one of the most important incidents in the life of David S. Terry, to present a chapter of political history in which other important personages took an active part and made the conditions possible which led up to tragic events, the absence of which would have removed the necessity for this biography.

William M. Gwin, a native of Tennessee, came to California in 1849, and, being a man of great force of character and ambitious in his desires to reach political eminence, won distinction by being elected one of the first United States senators to represent the new State

in Congress in 1850. John C. Fremont, the "Pathfinder," was his colleague, and in casting lots for the long and short terms, Gwin secured the former. He was a man of acknowledged ability, but he was not as scrupulously honest in his political methods as he might have been. No successful politicians are who make of politics a trade and labor for position. They lack the true elements of statesmanship. He had won the confidence of the Southern, or "chivalry," wing of the Democratic party, and had many staunch friends and admirers among the members of that party from the Northern States. In referring to this in after years when operating for the colonization of Sonora, in a letter to his brother, Gwin says:—

"It is a great work I propose to do, to populate an important part of an empire, now held by wild Indians for more than a hundred years. It is the richest mining country in the world, and will attract thousands of enterprising men. I intend to reverse my action in California. I went there determined not to make money, but *to devote all my energies to obtaining and maintaining political power*. Now I go for money, and shall let power alone. I want no dukedoms, nor any honors the emperor can bestow upon me. Nothing can be as high as what I have been as a senator in the greatest body of the greatest nation on earth."

David C. Broderick was a native of the District of Columbia, the son of a stonecutter, which trade he also learned, and in early life he made his home in New York City, where he mingled with his fellows and took an active part in politics. He belonged to the firemen, and his Celtic blood, always charged with

ambition for political distinction, led him forward in that line. Possessing a large share of native ability, and animated by strong physical force and a desire for position above his fellows, as the saying is, "he took to politics as a duck takes to water." He was as true a type of the Irish chivalry as Gwin was of the Southern chivalry, and for the matter of "gall," he had no peer in California. After becoming thoroughly identified with the New York firemen he opened a saloon as an aid to his ambitious desires. He became the pupil of the notorious Mike Walsh and Jerry Rynders, and having united with the Tammany organization, his peculiar genius soon placed him in a position where he commanded a lucrative office in the New York Custom House. While this position was remunerative, it did not satisfy his ambition. He aspired to something more conspicuous, and in 1848 he determined to run for Congress. By manipulating the "boys," he secured the nomination in his district, which was strongly Democratic. There were many men of good standing who did not admire the young man's style, and after the Whigs had nominated a man of prominence and ability, they set to work to secure Broderick's defeat, as they preferred a worthy opponent to him. In order to accomplish their object they placed another candidate in the field, named Jack Bloodgood, a scion of the ancient Knickerbocker stock, but a poor lawyer and not very temperate in his habits. They succeeded in their object and Broderick was defeated. The Whig candidate was elected. This defeat changed the whole course of his life, and in 1849, when gold was the drawing card in California, he shook the dust of

New York from his feet and resolved that he would never return until he could come as a senator of the United States.

He arrived in San Francisco in the summer of 1849, and, being practically without money, he determined at first to resort to his trade for means of a livelihood, but he met Col. J. D. Stephenson, who had been a friend to him in New York, and he furnished him the necessary means to go into business. In 1850 he was elected to fill a vacancy in the State Senate, and upon the occasion of a vacancy which occurred in the office of president of the Senate, he was chosen to fill that position. This recognition of his genius elated him, and from that moment he began to connive for a seat in the United States Senate, soon to become vacant by the expiration of the term for which Fremont was chosen. He was liberally endowed with magnetic power, and could convert enemies into friends with all the ease possible. He had studied the tactics of political manipulation during his associations with the Tammany chiefs and as a pupil of Mike Walsh. His habit was to associate with men of brains and influence, study their various natures, note their customs, and make friends with such as could be made useful in furthering his aspirations. He was an expert in manipulating men, but he failed to secure the necessary support to hoist him into the senatorial seat, as he so much desired. John B. Weller was elected to succeed Fremont in 1852, and as Gwin's term would not expire until 1855, Broderick began the fight to succeed him.

The following brief history of this memorable con-

flict is from the pen of James O'Meara, who was a friend of Broderick and also an admirer of Gwin, and as a participant in the political battle at that time, can be relied upon as being correct.

CHAPTER X.

BRODERICK'S METHODS AND AMBITION—DUEL WITH CALEB B. SMITH—ATTEMPT TO CHANGE ESTAB- LISHED CUSTOM TO SECURE A SEAT IN THE UNITED STATES SENATE.

“Broderick's opportunity to make himself the successor of Gwin in the Senate of the United States now entirely possessed him. He schemed and struggled for it by day and by night, ceaselessly, without scruple as to means, and with an energy that would have exhausted a less robust and less indomitable nature. Weller had beaten him; he was resolved that Gwin should not, if there was power that could be brought, no matter how, to prevent it. He was well aware that it was a desperate adventure upon the deep waters of political enterprise, and knew that many and towering difficulties must be encountered and overborne; that failure in any important particular would be ruin to all his hopes, and that opposed to him stood not only the then formidable wall of the Southern Whig vote, but the large proportion of the Democratic party, led by distinguished men who had won distinction as worthy leaders in the States they had left to embark upon a new destiny in the Golden State. But he counted all the difficulties, resolved to take all the risks, and with the unalterable determination to gain the goal of his consuming ambition, or to die while try-

ing, he formed his crude plans and proceeded to their accomplishment. At the very outset he alike intemperately rushed and terribly blundered into personal difficulties which a better-regulated temper, or a fair degree of prudence, would have led him to avoid. His course had raised up against him in San Francisco a very hostile feeling within the Democratic party, and in the primary elections this sentiment had triumphed during the session of the Legislature. The defeat of his faction, and in so far of his scheme, impelled him to use violent language in relation to ex-Governor Smith, of Virginia, a conspicuous leader of the dominant wing, which nothing could justify; nor could he retract it without something of self-dishonor and the taint of cowardice, which alone would have been fatal to his senatorial aspirations."

He fought a duel with Judge Caleb B. Smith, son of ex-Governor Smith, on the 17th of March, 1852, on ground near Oakland Point. A watch in his fob pocket saved his life, and after the duel he withdrew the offensive remarks in presence of a full Senate.

"In the South, as in nearly all the States, except New York, the Tammany system was not in vogue at the time of the gold discovery in California, and hence neither Gwin nor the mass of the Democrats in the State were versed in or accustomed to it. In fact, they were generally averse to it. But it was a first consideration of Broderick in his struggle for a seat in the United States Senate, to institute the Tammany system of organization in every county where he could get foothold. This was his initial plan on which to base his fight against Gwin, and it was sagaciously

determined; for had he succeeded in it, no power within the Democratic party, then in the supremacy, could have stood against him as its arbitrary chief. Gwin chose, in some portions of the State, to accept the gauge of battle, and to fight Broderick with the party tactics of his own Tammany order; but his main plan of action was that to which he had always been accustomed—the old-fashioned, popular mode of organizing and prosecuting party campaigns, and the mode generally adhered to in the West and South—that of unrestricted and untutored action on every fresh occasion, without partisan machinery, and, in the common parlance, ‘free and aboveboard.’ To this popular method of managing party affairs throughout the State, Dr. Gwin never failed to supplement his own marvelous skill and efficiency in what is known as ‘still hunting.’

“Popular oratory was not Gwin’s forte, no more than it was Broderick’s. Neither of them possessed that fluency of speech and happy, off-hand address which charm, divert and sway multitudes. The two were alike in the one quality of prevailing with those who were the popular leaders of the multitude by their own superior powers of personal magnetism or persuasion; but yet they were as different as darkness and light in their respective manner of thus prevailing with men. Broderick was so entirely immersed in his own plans, and so completely absorbed by his own ambition, that he was irascible in his impatient requirement upon all whom he sought as his aids or adherents, and frequently repelled the very men he most needed. He was naturally of an overbearing, domineering disposition, and this had grown upon him in his New

York career as one of the master spirits of the fire department, and in Tammany Hall. In his fierce zeal or hot wrath, because of temporary disappointments, or occasional disagreements with even his own devoted followers, he would explode a torrent of harsh invective, or give vent to vehement imprecation and foul abuse. His most difficult struggle was to master himself, and the failure to do this sometimes cost him and lost him the men whom he most wished to secure and to retain as friends and supporters. In all these personal qualities Gwin was the opposite of Broderick. No man had better self-control. He was the cautious master of many men of master minds, but he was always the most cautious master of his own strong, vigorous, sometimes grandly violent, nature; and he never allowed any, whether friend or foe, to depart from his presence with the rankling feeling of an ill-natured word, or sense of wrong from any cause, unless he had deliberately determined upon such a course, and meant not to be misunderstood. He looked a great man; his life had been in intimate relations with the greatest in the land, and he was in leading respects, beyond question of rivalry, the greatest who challenged the suffrages and the confidence of the predominant party in California.

“The larger proportion of the men of Southern birth and sentiment favored him in preference to any other. Most of the Western men, led mainly by Col. Tom Henley, the ‘war horse’ of the Democracy, supported him; and among the New York Democrats, and those from other Northern States, many of them merchants and men of wealth, he had a very formidable following.

Broderick's chief strength was in San Francisco. Here he had succeeded in planting his Tammany system of organization, and he controlled it. But it was not even here the controlling wing. The same class that has been most faithful to his memory since his untimely death, were then almost his only supporters, and while they were the most active in the party organization, the anti-Broderick wing was the most formidable in numbers and influence here and throughout the State. Still, he was assiduously teaching active and aspiring men in every county the tactics by which, by helping himself as chief organizer, they were certain at last also to promote their own individual interests; and where persuasion failed, he had no scruples in obtaining supporters and aids by other means. He never allowed any obstacle to stand between him and his object, so long as he could employ the arts to remove or surmount it. He never shrank from the rule, never hesitated to apply it. To win was the invincible determination; by what means to win was a question to be decided as the occasion occurred. Hence, against the tremendous odds he found opposed to him, he was prompted to a plan to come sharply to the ambition of his soul, in defiance of the opposition. It was a deep and subtle scheme, at once crafty and bold, daring and desperate. It was, in the face of all past usage, abhorrent to the popular sentiment. It struck at the sancity of all precedent; it was, in a measure, revolutionary. It never had example; it is still without parallel. Politically, it convulsed the State. It created consternation here, and was the cause of eager speculation at Washington. Throughout the Union the

protracted struggle was viewed with various emotions of curiosity and alarm.

“He attracted to his side and cause a formidable number of the disappointed aspirants and applicants for federal positions in the various departments of the government service, most of whom had labored with and occupied more or less conspicuous positions in the wing opposed to him, and who fought for selfish ends more than for any real devotion to Democratic principles. And in the fierce and bitter struggle for the supremacy which Broderick waged that year to get control of the nominating conventions throughout the State, for State officers, and the Legislature especially, these unprincipled allies proved to him of great service. Yet, notwithstanding his most arduous labors, and the application of Broderick’s unscrupulous and skillful tactics to gain this supremacy, he was only partially successful throughout the State, and in his own chosen stronghold of San Francisco. He succeeded in securing Bigler’s renomination for Governor over Major Roman, but the popular Democratic sentiment was so strongly averse that, while the other candidates upon the State ticket received large majorities, the election of Governor Bigler was barely an escape from defeat. It was vital to Broderick’s undeveloped scheme to have Bigler renominated and re-elected, and to the consummation of that scheme the election of a majority of the senators and assemblymen for the ensuing Legislature was likewise essential. But in this part of his scheme Broderick failed, and the failure compelled him to a change of tactics, and devolved upon him the exhausting strain and heavy

expense of two years more of the most remarkable political campaigning that has ever been known in a struggle for a seat in the Senate of the United States.

“It was this scheme which, at the time of its announcement to the public, created unparalleled surprise and consternation in the Democratic ranks and throughout the community. It startled the oldest politicians, and perplexed senators and the great men in power in Washington. Nothing like it or equal to it had ever been conceived or suggested in any State from the birth of the republic. It struck at the accepted spirit of the Federal Constitution, as the instrument itself had been interpreted from the earliest periods, and yet no man could authoritatively assert that it was in contravention of the express letter of the article and sections which relate to the election of United States senators. Everybody was amazed at the unexampled presumption which inspired the astonishing proposition; and yet everybody who knew David C. Broderick well enough to fairly estimate the man, at once comprehended that, extraordinary and incredible as it appeared, the proposition was one from which he would not shrink, nor would falter in pressing to the last extremity, so long as there remained to it the faintest possibility of accomplishment, entirely regardless of public sentiment, wholly disdainful of precedent and usage, and without any other thought or care or anxiety in connection with it, except the sole consideration of its feasibility and its success.

It is due, however, to the memory of Broderick to state that he was not the conceiver of the scheme; that it did not originate in his own busy brain, driven

to high pressure as it was by the intense labors his own unsparing and incessant drafts made upon it in the ceaseless pursuit of the object of his consuming ambition; and that, in his impetuous fervor to grasp that object at the earliest moment, his moral perception was so overcast by the instinctive belief that the prize was really within his reach as to blind him to every other thought or concernment in connection with it, either moral or physical. The opportunity was pointed out to him by the man in whom, above all others, he reposed the utmost confidence. He had been led to see the way, and he felt that he could supply the means. It was as the showing to one well-nigh hopeless and in despair in the darkness of the Valley of Death the faint glimmer of the light of life—to impart fresh inspiration for the final desperate struggle, which might rescue him from the near impending doom, no matter at what peril or cost the struggle should be made; and to triumph in it everything else in nature must be subordinated—riches, friends, conscience—all except self alone. It was in this spirit Broderick waged his memorable fight for the Senate during the session of the Legislature of 1854. The Constitution of the United States did not expressly forbid the election at that time, but the unbroken precedent of all the States, and the unanimous expectation of the people of California, were opposed to such an election. It was the design and proposition of George Wilkes, in whom Broderick had implicit faith, and who was singularly fertile of resources in desperate exigencies. He cared nothing for the spirit of constitutions or laws. What could be done

was his measure of what should be done. 'Is it so nominated in the bond?' 'Does the Constitution or the law expressly declare or provide against so and so?' These were his guides to action in all such matters, and he so read the Constitution and interpreted the law to Broderick, until he fired him with the resolution to make his bold push for the Senate by forcing the election by the Legislature one year in advance of the accepted and allotted time. He made it the fight of fights in California politics."

CHAPTER XI.

DAVID S. TERRY CONSPICUOUS AS A POSSIBLE CANDIDATE FOR SUPREME JUDGE—HIS NOMINATION—ELECTION OF 1855—KNOW-NOTHINGS VICTORIOUS—TERRY ELECTED ASSOCIATE JUSTICE OF THE SUPREME COURT.

The election of 1853 came, and, as a result of Broderick's Tammany system of organization, he secured a good majority in the Assembly, but the Senate was problematical. There were one or two men who were stubborn in their adhesion to established political forms, and to these men Broderick directed his attention. This Legislature was composed of men a large number of whom became prominent in the after history of the State. Among them was Royal T. Sprague, James Coffroth, Judge Hager, John Conness, Chas. Fairfax, Judge Bryan, and Judge Hall. The supporters of Broderick were more conspicuous for ability in every way than those of Gwin, and all, save Sprague, of Shasta, favored his scheme. That one vote would defeat it. These men knew Broderick well enough to cause them to feel that sooner than suffer defeat he would forego every other earthly consideration, if not of the hereafter as well; that he would not hesitate to sacrifice all in life, and all except life itself, to win, for his terrible earnestness and his

devouring ambition had neither remorse nor pause this side the grave.

“It was George Wilkes’ device, the proposition to elect the United States Senator to succeed Dr. Gwin, March 4, 1855, one year in advance of the regular time, according to precedent and expectation—to pass a bill to authorize that very Legislature to elect the senator—to appoint the day for election by joint convention; and, this done, the election of David C. Broderick as the senator would follow as the inevitable matter of course. Should he be able to prevail upon the Legislature to order the election at that session, it would be impossible to defeat him of the election as senator. And when this conviction broke upon the leading men of the Democratic party of the State who were opposed to Broderick for senator, or who preferred another for the place, the process was rapid, though deliberate, from astonishment and consternation to preparation for the strong and well-organized resistance that each man felt would be necessary, but which might not, after all, avail against the already-organized plan of the Broderick forces.

“In his desperate scheme to force the election of United States senator one year in advance of the proper time, as precedent had established it, at the session of 1854, Broderick stood alone in the mighty contest, with all the allied powers arrayed to defeat him. As declared or possible aspirants for the place, on the other side, were four or five; but the avowed candidates were Senator Gwin, for the succession to his own seat, and General James A. McDougall, then Representative in Congress. Both were in Wash-

ington, but each had his trusted agents and workers at Benicia, and wherever else they could be of service. Major Hammond championed Gwin's cause, with a reserve in his own behalf should any contingency arise to warrant his own avowed candidacy. General McDougall's chief agent was Henry B. Truett, a prosperous merchant, formerly mayor of Galena, Ill., who had acquitted himself in a very creditable manner in a quarrel with Broderick, in the Union Hotel bar room—Broderick's headquarters at the time—to which he had gone unattended, and where Broderick's attack upon him had been unprovoked. As aid to Truett, for McDougall, was Reuben J. Moloney, formerly of Illinois and New York, and a widely-known politician of the early California period. Prominent among Gwin's supporters were Major Folsom, Captain Bissell, and the Pacific Mail Steamship Company. Broderick was principally backed by Palmer, Cook & Co., and in the front rank of his active workers were A. A. Selover, John Middleton, Judge Ned McGowan, Colonel A. J. Butler, Thomas Maguire, Robert J. Woods (a Southern man of much local influence), and Frank Tilford, whom he had appointed district judge in this city. General James M. Estill was also favorable to him at that session, and he was a political manager of uncommon energy and address, who exercised great power in moulding political events.

“The Legislature convened January 2. January 27 Assemblyman Gordon, of Amador, gave notice that on the following day he would introduce a bill to fix a day on which the Legislature then in session should elect a United States senator to succeed Dr. Gwin.

The next day he introduced the bill. On motion of Mandeville (anti-Broderick man), against a motion of Hoff (Broderick), to refer it to the Judiciary Committee, it was made the special order for January 31 by a vote of 37 to 32. It was Broderick's bill. The first vote upon it was an anti-Broderick victory, but an unimportant one. Then followed the fiercest and longest-protracted fight of magnitude ever made in the Legislature of California.

“The two Houses were largely Democratic; the State was Democratic; that year, further on, the State Convention would be held for making congressional nominations, equivalent to election. And hence the significance of the queer scene which occurred one Saturday morning in the Assembly Chamber, in Benicia, early in the session, when honest old Colonel W. W. Gift entered with a six-shooter in hand, and cried out aloud to the House that, were he to point the weapon and threaten to shoot the first one who should dare to announce himself a candidate for Congress, three-fourths of them would dodge under their desks. In his wild pleasantry the sterling veteran simply touched upon the raw. The first open step to influence or attract public opinion was the preparation of an argument, on Broderick's side, to show why the election ought to be held that session, and to convince the people that it was nearer right than revolutionary. The sum and substance of the argument was, that as the senator to succeed Dr. Gwin might be required to take his seat March 4, 1855, and as the journey to Washington consumed fully a month by steamer route and the Isthmus, to

put off the election until the session of 1855 would be to run the risk of repeating the experience of 1851, when no senator was elected, and thus to have the State go without one of the two senators at an important session; or, it might happen that the election of the ensuing session, if held, would be too late to enable the senator to reach Washington in time to take his seat on the day of meeting. This was, substantially, the argument set forth on the Broderick side for the election in 1854.

“The allied forces opposed to the scheme obtained information of the proposed ‘Address to the People,’ and immediately took time by the forelock by preparing an address on behalf of precedent and usage, to arouse the people to the importance of the matter, and cause popular denunciation of the revolutionary project. The anti-Broderick and anti-election address was first printed and earliest circulated throughout the State. It appeared on a Saturday during February, and on the succeeding Monday the Broderick address was published. As signer to each—the sign manual in each case genuine—appeared the name of one of the senators from Placer County, who had been nominated and elected as an anti-Bigler, anti-Broderick man, the Hon. Charles A. Tuttle. It was a queer position to occupy, a straddle as figuratively painful as was that in which the blundering Briton placed ‘Britannia, seated upon her trident.’ But Mr. Tuttle was not the only member of that Legislature who either ‘saw the right and pursued it, too, or condemned the wrong and yet the wrong pursued.’ The secret history of that contest, which

cannot yet be given to the public, would itself reveal enough to warrant the postulate of Sir Robert Walpole, that 'all men have their price.' Yet it would be invidious to discriminate in these sketches to such purpose as to resurrect and present the facts, and make exposure on either side.

“ But there were events which cannot be suppressed or disregarded with propriety, in order to give a fair and clear understanding of the whole case. Among these was the ‘Peck and Palmer bribery’ affair. Elisha T. Peck was the senator from Butte County. He had been a Whig, but was so little of a party man, and was considered so honest by his fellow-citizens, among whom he was generally known as a merchant of excellent character, that he was elected by Democratic votes. There was nothing of the politician in his composition; nothing of the party manager or leader. He was simply an honest, truthful, modest, candid, straightforward man of fair average intelligence and good sense, in whose even make-up there was neither the sharp, salient qualities which distinguish men above their fellows, nor the common clay which is moulded by any who presume upon confiding intimacy to pervert the friendly relation into designing mastery; and he was as artless as he was sincere in his attachments. As between the several aspirants for the senatorship, he really had no decided choice. He was a Northern man, and, therefore, his sympathies were with those from his section. As a merchant, he knew Henry B. Truett better than any other of the active managers in the great contest of the session, and to him he had confided whatever

views he entertained in relation to it. And as Mr. Truett was the special champion of General McDougall, and was strenuously battling against Broderick and his scheme to force the election of a senator that session, Mr. Peck quite naturally acted in conformity with Mr. Truett's persuasion and counsel. As he was known to all engaged in the contest as a man of not much firmness, some who were less intimate with him conjectured that therefore he must be of weak and yielding nature, and thence sprung the occasion for the Peck-Palmer bribery matter.

“Joseph C. Palmer was the senior partner of the banking house of Palmer, Cook & Co., at that time one of the widest-known and oldest-established banking institutions in San Francisco. Palmer was himself the head and life of the house—an uncommonly sharp, shrewd, bold, adventurous man, who judged men at a glance, and rarely misjudged any. No one in the community had better information of the hidden springs which move and mould men and events, or were better qualified to ably utilize the information to such purpose as he wished or willed. With rare insight he grasped the situation at a glance; and once the master of it, he had to be indeed a sagacious and powerful rival or adversary that could dispossess or outmaneuver him. Mr. Palmer was a firm believer in the Walpolian doctrine concerning men—in public as well as private life—a useful friend, a powerful enemy. On the morning of Thursday, January 19, at the earliest opportunity, Senator Peck arose in his place and proceeded to speak on a privileged question. It was to the effect that, on the 7th of that

month, while on the passage from San Francisco to Benicia, on the steamboat *Helen Hensley*, he was introduced to Mr. Palmer by A. A. Selover, and that in a private conversation with Mr. Palmer, a short time after, that gentleman had offered him \$5,000 in gold coin to vote, first, for bringing on the election of senator, and, next, for Mr. Broderick for senator. To this offer he had replied, 'i will not sell my vote; I cannot be bought.'

"First to take official notice of the charge of Senator Peck was Senator Tuttle, who immediately moved the reference of the subject matter to a special committee of five for investigation, but this was rejected to give place to the only proper motion under the circumstances, that of Senator Hager, to have the charge investigated at the bar of the Senate. On motion of Senator Sprague, the investigation was set for January 24. On that day Mr. Palmer appeared before the bar of the Senate with General Williams, Stephen J. Field (now associate justice of the United States Supreme Court), and Hall McAllister, as counsel. Colonel Ed. D. Baker (afterward senator from Oregon) was counsel for Mr. Peck. Three stenographic reporters were appointed to officially report the case, the testimony and arguments to be reported in full. Senator Peck stated his interview with Mr. Palmer. The witnesses for the defense were Mr. Palmer himself, A. A. Selover, Will Hicks Graham, Thomas McGuire, and others of less note. Judge W. T. Barbour, of Yuba, Judge Winfield Scott Sherwood, W. H. Taylor, and others of more or less prominence, were the witnesses on Peck's side. The

testimony was throughout conflicting, and some of it evidently 'cooked.'

"The case lasted from the 24th of January until the 3d of February. By arrangement General Williams opened. Colonel Baker replied, and General Williams then made the closing speech. General Williams consumed two days in his argument; Colonel Baker spoke about four hours. The defense had shown wonderful vigor and skill in the examination. Colonel Baker had not taken a note in writing all the time, and he seemed indifferent as to the evidence. He was then comparatively little known in the State, except by those from Illinois and the West, and the Broderick men, who had witnessed the investigation and observed the array of eminent counsel in Palmer's behalf, watched the masterly management of that side, and noted the conspicuous ability of General Williams in worrying the accusing senator into all manner of entanglements, offensively ridiculed the folly and ill-judgment of the anti-Broderick managers in having employed only one as counsel, and that one of so little apparent effectiveness, and in this view they were largely backed by many of their adversaries during the taking of the testimony.

"Colonel Baker was not the choice of Major Hammond, nor of the other manager for Senator Gwin, with whom he generally acted. He was selected by Mr. Truett, whose enthusiasm and protestations and appeals finally led his confrere to yield his own preference to his; and thus Colonel Baker became sole counsel employed on that side of the case. His view of the matter was that, as an investigation, either to

vindicate Peck or to cast odium on Palmer, it would be vain and futile; that only in its partisan or political aspect, to produce popular prejudice against Broderick and his bold scheme, and thus to prevail with the more impressible of the members who were supporting the scheme, so as to work its defeat, could the investigation be of effect; and, hence, it must be in the manner of placing the case before the people, more than in the matter, that the popular interest would be centered, the public sentiment influenced. He assumed, as a matter of course, from the action of the Senate in employing three stenographic reporters, that not only would the testimony be printed in full in the journals of the Senate, but also would the arguments of counsel be fully presented therein. In keeping with this view, he had devoted no more attention to the mass of testimony and to the details of the case than was essential to his own purpose in the argument, and he intended that that should be more in the style of a flaming, rousing, impressive, convincing partisan speech, to make popular capital for the side he represented, than in the line of a legal argument or elaborate appeal to the senators, sitting, like so many jurors, with their minds already made up beyond the power of logic, law, or oratory, to sway or affect them, as they were. But General Williams manifestly regarded the opportunity as one to exhibit his legal profundity, as well as his forensic eloquence, and, as such, made the most of it. The Senate Chamber was densely packed with spectators to witness the intellectual battle between the pitted giants—the one, the embodiment of law, close rea-

soning, absolute fact, infinitesimal distinctions, barely visible shadings, and inexorable judgment against every instinct of nature and impulse of sympathy; the other, the impersonation of that expanse and that splendor of genius which makes of speech the luminous matter to set aglow the mind, and then, with its resistless flow in grander form, moves on the subjected mass to its own willed conclusion.

“The speeches of General Williams were all law, all fact, all argument, based upon the testimony. The argument of Colonel Baker was a brilliant, powerful, surpassing speech, magnificent in style, grand in its conception; here flowing with the grace of a charming epic, there thundering with the stupendous force of the avalanche; now swaying all with its majestic eloquence, anon lacerating the defense with its fierce invective, or torturing with its merciless cautery. He depicted Broderick as the lion, Selover as the subservient jackal, and Palmer’s fond embrace was pictured as the golden clasp with the sting of death to the honor of its encompassed victim. Rarely was the ‘Gray Eagle’ more eloquent—never was he more caustic. And so ulteriorly effective was his speech that, when he next had a political case to champion in the interest of warring Democrats, it was as the advocate of Broderick he appeared.

“But the Peck and Palmer case utterly failed of effect at that time, in practical form, either before the Senate upon the grand contest which occasioned it, or with the people. Its termination was as ludicrous as Jo Baldwin’s characterization of the noted case in which he said ‘the law was given to the North and

the nigger to the South.' The Senate verdict was given, in double-barreled, back-action, contradictory form and sense, recorded, to this effect: (1) That the statement of Senator Peck had not been sustained; (2) that the decision of the Senate did not in any degree reflect upon the honor and dignity of Mr. Peck. In other words, (1) that Senator Peck did not tell the truth; (2) that it did not in any degree reflect upon the honor and dignity of Mr. Peck, or any other senator, not to tell the truth. David Mahoney was the only senator who voted 'No' on the last proposition or resolution.

"On the same day, Friday, February 3, that the Senate gave its extraordinary verdict in the Peck and Palmer bribery case, the Assembly, upon motion of Ben Myres, of Placer (Broderick man), tabled the bill to provide for the election of United States senator at that session, by a vote of 44 to 32. The vote did not correctly represent the sentiment of the House on that question, however, nor was it the policy of Broderick's opponents to then reveal their actual strength in that body, although they were in the minority. The bill was tabled by Broderick's own supporters in the House, merely to let it await the action of the Senate, and, if favorable, then immediately to take it from the table and pass it."

The Legislature met at Benicia for the last time on the 25th of February, and on March 1, 1854, it assembled in the courthouse at Sacramento. It proved the doom of Broderick's bill to force the senatorial election. It passed the Assembly March 6, by a vote of 41 to 38. In the Senate the bill was

called up the next day, and was passed by the casting vote of the presiding officer, Sam Purdy. Senator Jacob Grewell, of Santa Clara, who had been opposed to the bill, had voted for it, and, although he had been considered a man of strict integrity heretofore, a few now realized that he had been tampered with, and that night they prepared their plans to undo all that the Broderick workers had done in view of a reconsideration of the vote. The next day Grewell arose in his seat and moved to reconsider the vote, and the final vote was 14 for to 19 against the bill, Catlin, of Sacramento, and Sprague, of Shasta, having changed their minds. It was a heavy blow to Broderick, but he was neither killed nor paralyzed.

At the conventions of 1855—for the Democratic party was now hopelessly divided—two tickets were placed in the field, and it was then that the other elements combined and placed in the field what was known as the “Know-Nothing” ticket. Having given a fair and modest estimate of the character of Broderick, provided by a contemporary and one of his friends, the reader’s attention is called briefly to the political character of Judge Terry.

CHAPTER XII.

THE CAMPAIGN OF 1855—TERRY AS AN ADVOCATE OF REFORM IN POLITICS—SUCCESS OF THE KNOW-NOTHING TICKET.

While the questionable proceedings that have just been related were in progress, David S. Terry was attentively engaged in the practice of his profession at Stockton. Being strong in his prejudices and determined in his purposes, while he inherited a large share of ambition, he was wedded by nature to a more generous share of uprightness, and he hoped to merit distinction rather than delve into the depths of political debasement and resort to unworthy methods necessary to successfully combat professional tricksters in order to accomplish any purpose, much less that of securing an office. He was a positive man, even to rashness, and such characters never succeed in the political arena. The California methods at that time were based upon intrigue, as the natural result of a personal warfare between the two champions contending for the United States Senate, and it was not, "Are you a Democrat?" "Are you a Whig?" "Are you a Freesoiler?" or "Are you a Know-Nothing?" It was, "Are you a Gwin man?" or "Are you a Broderick man?" Terry took no active part in the conflict. No particular fame or notoriety drew him from his business, although he was an interested spectator, opposed to the

aspirations of Gwin, and destined to make his mark for good or ill at no distant day.

His special prominence at the bar barely pointed to him as one whose name would figure conspicuously and eminently in the future history of the State. His ability and integrity were unquestioned, and his great force of character was acknowledged and these virtues could not be ignored in the labors of the "Opposition" Convention which assembled at Sacramento to make up a ticket. This movement was watched with deep interest by Broderick, who had no object but a personal one to be gratified. He was simply opposed to the "chivalry," as that element was opposed to him, but he was absolutely powerless in his attempts to manipulate and control the Know-Nothings. They guarded every approach to their councils by outsiders, and a more restless man never nursed ambition. The men who took their seats in that convention were of the most respectable and prominent class, which greatly surprised the lookers-on who were present out of mere curiosity. Whigs, Democrats, Republicans and Free-soilers were mingled there in harmony, presenting a sort of political millennium, but sending a chill through the marrow of the Democratic factions that were quarreling over the spoils and for power at the expense of decency.

There was a division of sentiment in this convention among the delegates as to who should head the ticket. A very large and respectable portion from the country, led by ex-Governor Foote, of Mississippi, favored the nomination of David S. Terry for Governor, and had he desired the position on the ticket he could have had

it, but he was no manipulator. His name was submitted, however, but there were elements at work to give him a place where his professional talents and his abilities would be more usefully applied, and the friends of J Neely Johnson were aggressive. It was Terry's personal preference to become a candidate for the Supreme Bench. His reputation had been made at the bar, and he was the recognized leader among all the members of the legal profession. Acceding to his desires he received the nomination to fill the unexpired term of Chief Justice Alexander Wells.

It would probably be erroneous to assert that David S. Terry was not very anxious to be elected after his name had been placed upon the ticket for such an honorable and important office. There are but few men, and they not in the list of professionals, who have no political aspirations. He was a man of flesh, and the flesh is weak in the presence of an invitation to honorable distinction. The prospects, however, were not very flattering, and while he submitted to the ordeal, he had but little hopes of success. The party to which he was allied had no perceptible organization in the State. Its work was done in secret councils, but its allies, who distrusted the factions into which the Democratic party had fallen, on account of the bitter feud existing between the two prominent and ambitious leaders, seemed determined to defeat them in their factionous warfare. Terry did not make any special plea before the people for the office, but he made a canvass for the ticket in connection with other candidates. The office of supreme justice was one which he considered of too sacred a character to be dragged in the

mire and filth of partisan wrangling, and, above all, he made no concessions to friends or foes that might be construed into obligations on his part. Should he be elected he would be free from any pledges and independent of any special favors. His associates on the ticket were all men of excellent repute, and he would not be alone should defeat follow the battle at the ballot box. The prominent men who canvassed the State for the Know-Nothing party ticket were: Ex-Senator and ex-Governor Foote, of Mississippi; Colonel E. C. Marshall, James Coffroth, and Henry Crabb.

When the election came, in September, the Know-Nothings swept the State. It was a political surprise, and as much so to David S. Terry, who was not a politician of keen perception, as it was to either Broderick or Gwin. This sudden and unexpected elevation to a position to which he had fondly aspired, but came to him as an accident, was very gratifying, and no doubt fed his vanity somewhat, although, aside from his well-known scruples as to his integrity and honor, he was absolutely without either pride or ostentation. He took his seat in October, 1855, fully imbued with the dignity and responsibilities of the position.

CHAPTER XIII.

TERRY OPPOSED TO VIGILANCE COMMITTEE—HIS VISIT TO SAN FRANCISCO IN THE INTERESTS OF LAW AND ORDER—EXCITING SCENES—HE RESISTS THE AUTHORITY OF THE VIGILANTES AND STABS HOPKINS IN A STREET FIGHT.

Probably one of the most exciting and memorable events that ever occurred in a civilized country took place during the first year in which Judge Terry occupied a seat on the Supreme Bench. The climax of fraud at the ballot box and in the courts of San Francisco was reached. The people became aroused at the magnitude of evils that were undermining both the social and political fabric, and the organization of criminals existed as well throughout the State. The election of 1855 was so glaringly corrupt, and the lives of respectable citizens became so insecure, that the business men, and all good citizens, resolved to organize a Vigilance Committee, for public safety and security. At the head of this organization was W. T. Coleman, a man in whom all had implicit confidence for integrity and good judgment. The leading incident that led to the organization was the frauds upon the ballot box committed by stuffers under the manipulations of a man named Casey, in his ambition for a seat in the City Council. He was a politician

of the most desperate character. The frauds having been discovered and traced directly to him and those of his kind, the *Evening Bulletin*, edited by James King of William, a gentleman from Virginia, who had exhibited a character for honesty and ability, and a great zeal for good government, in the conduct of the newspaper, openly and vigorously denounced the frauds and arraigned Casey as a ballot-box stuffer and swindler, in scathing language.

His paper produced a profound sensation among the business men who had refrained from mingling and taking an active part in the political strife, but who realized the truth of the charges. The next morning, without a word of warning, Casey entered the editorial rooms of the *Bulletin* office and demanded of King if he had written the article attacking him, and, having received a prompt answer in the affirmative, he drew a pistol and shot him dead.

Shortly after the organization of the committee, and before the hanging of Casey, Broderick and Jo McKibben were "invited" and escorted to the committee rooms, by the officers of the committee, and the extraordinary double event created much curiosity, or excited great consternation, in the circles of their respective friends and in the community generally. But the two soon afterwards, the same evening, returned to their accustomed places of resort, and the wonder and alarm thereupon subsided. They had been summoned simply to give evidence in respect to the shooting of King by Casey, and as to Casey's character. But the arrest of some, and the notification of arrest, unless flight should make it unneces-

sary, of others, mostly the supporters or friends of Broderick, were circumstances which, too plainly to be misinterpreted, signified that his followers mainly were to be proscribed and pursued.

Yet Dr. Gwin and General McDougall and Major Hammond were as stoutly and strenuously opposed to the usurpation and lawless rule of the Vigilance Committee as Mr. Broderick. And there were several members of the executive committee of the Vigilance Committee who had engaged or participated in, directly and indirectly, the grossly irregular practices of electioneering, by what was termed the "ballot-box stuffing" process, to secure the election of themselves or their favorites for office, as deeply and as criminally as had any of the persons the committee had arrested or expatriated. The effect of these arrests and banishments was, however, such as to impel a round number of Mr. Broderick's most active local supporters and "workers" to leave the city and take refuge in interior portions of the State, where the popular sentiment was strong against the committee. And at last Mr. Broderick himself and Colonel E. D. Baker found it advisable also to withdraw from San Francisco, and seek the more friendly association of their respective admirers, champions, and Anti-Vigilance sympathizers in the interior counties.

Casey and a man named Cora, an Italian of unsavory reputation, who had been imprisoned for some unlawful act, and was then in jail, were tried by the Vigilantes and hung to a beam in front of the Vigilante's headquarters. The committee was organized with an Executive Committee of thirty-six members,

and a board of control consisting of one hundred, before whom all cases were tried. They dealt out punishment to all murderers, thieves and lawless characters, banishing those who were known to be of bad repute, but who had not committed acts of violence in the extreme.

The State authorities dreaded the existence of this organization, but were too weak and impotent to take any decided action to allay the excitement. The Vigilantes had the sympathies of a majority of the people of the State, and had the State administration, instead of opposing the movement, united with it in securing good government, the proceedings would have ended without the extraordinary incidents which occurred during the existence of the organization. The State militia, under the direction of Volney E. Howard, who succeeded General Wool in command, undertook to ship arms for the State barracks from Benicia to San Francisco for the purpose of attacking the headquarters of the Vigilantes, who were strongly fortified in a building, which was named by its enemies "Fort Gunnybags" in derision. Learning of this movement (for they had spies in every nook and corner of the State), they sent a detail of three men up the bay under the command of one of their police officers, who captured the vessel and arms at a point between San Francisco and Mare Island in charge of Lieutenant Phillips, of the State militia, and others.

Judge Terry was opposed to the Vigilance Committee. He had been in conference with Governor Johnson, General Wool, General Sherman and Volney E. Howard, urging the State government to exercise

its constitutional authority to suppress the unlawful proceedings. The Governor had issued a proclamation commanding the committee to disperse and bring their complaints before the lawfully-constituted tribunals of the State, and the committee issued an address to the public, stating that—

“Power emanated from the people, and laws from representatives honestly elected, faithful officers, honestly chosen, must execute them. When the laws failed of execution it was the people’s right to resume the power they had delegated, or which had been usurped. They did not resume all the powers confided to the executive or legal officers, but only in such departments as allowed justice to be thwarted in the regulation of social order and the rights of the people in a political sense. They had taken an oath and bound themselves, the one to the other, to do and perform every just and lawful act for the maintenance of law and order, and to sustain the laws when faithfully and properly administered, but were determined that no thief, burglar, incendiary, assassin, ballot-box stuffer, or any other disturber of the peace, should escape punishment, either by quibbles of law, carelessness or corruption of officers of the peace, or a laxity of those who pretended to administer justice.”

Judge Terry’s position was one of the most delicate under the circumstances. He had taken an oath to support the Constitution of the State, and it was his duty to construe the statutes and uphold the dignity of the commonwealth. He was, in the strictest sense, a martinet on the bench. Imbued with that high regard for honor and principle which lends to the per-

formance of duty a commendable dignity and patriotic devotion, he writhed under the peculiar conditions which had obtained in San Francisco. His whole being was aroused when he contemplated the existence of a self-constituted tribunal usurping the judicial prerogatives, of which he was a prominent part. It stung him to the quick when that "modern Areopagus," as he termed the Vigilance Committee, treated a writ of *habeas corpus* with silent contempt, which he had issued for the release of one Billy Mulligan, who was a prisoner in the hands of the Vigilantes.

Billy Mulligan had been a deputy sheriff, and was found guilty of stuffing ballot boxes. The committee held him until they could determine what should be done. The sheriff, in attempting to serve the writ, had not the password and could not gain admittance into the fort, hence the writ was never served.

It was in the presence of such circumstances that Judge Terry concluded to go to San Francisco, hoping that his presence and counsel might be exercised to allay the excitement, and bring order out of chaos. Had he been a politician he would not have done so. His judicial mind did not grasp the situation correctly, but he was infatuated with a desire to lend his presence and the influence of his high position as a representative of the judicial head of the State government to adjust the difficulties. To charge that he went with any other than the most pacific purpose would be counter to the estimate in which his character was held by his most inveterate enemies.

Hon. Henry Edgerton, who was one of the bitterest opponents he had, and a devoted follower of the Brod-

erick and Douglas wing of the democracy, when the fiercest conflict was raging, publicly declared that "it is my deliberate opinion that it would be an impossibility for David S. Terry to do an act of dishonor."

On the 20th of June, 1856, Judge Terry went to San Francisco, and instead of visiting and conferring with the Executive Committee of the Vigilantes, he sought his more immediate political friends who were enemies of the committee. He went to the office of Naval Agent Dr. Ashe, located in rooms over Palmer, Cook & Co.'s banking house, corner of Washington and Kearny Streets, where several gentlemen were congregated. After conferring with these gentlemen and understanding the situation of affairs, and that his services would not be acceptable, as was represented to him by those who understood the vigorous policy pursued by the Vigilantes, he concluded to return to Benicia on the 4 o'clock boat, and made his arrangements accordingly.

Reuben Malloney, who had been captured with the arms and schooner on the bay, and who had been granted his liberty, was wanted as a witness before the committee. He failed to appear when wanted, and the committee detailed Sterling A. Hopkins, one of their police officers, and two men to arrest Malloney and bring him before them as a witness. At this juncture Terry was with his friends, and had in his hand a musket belonging to the State armory, which he was examining. Hopkins and his men appeared and attempted to arrest Malloney, who had sought refuge in the room, and produced a warrant issued by the officers of the committee. When he read it and

attempted to arrest Malloney, Judge Terry promptly interfered, and informed Hopkins who he was, stating that no illegally-constituted tribunal should exercise such unlawful power in his presence. Naval Agent Ashe, Ham. Bowie, Martin Reese and Hayes were present, and Malloney asked protection of the State and Federal authorities. Being thus warned, which was construed as a defiance, Hopkins and his posse immediately returned for re-inforcements. When he reappeared with his force under arms and fully equipped for the fray, he saw Dr. Ashe, who was also a captain of the State militia, Judge Terry, Ham. Bowie and Malloney, armed with guns, turning the corner of Washington and Kearny Streets, on their way to the armory, which was located on the corner of Jackson and Dupont Streets.

Just before reaching the armory, Hopkins came upon them with his men, and, in attempting to arrest Malloney, was about to pass Judge Terry, who was in the rear. Terry presented his gun and attempted to stop him, and a scuffle ensued, in which Hopkins made an effort to secure the gun. At this instant a pistol was accidentally fired, and, as Hopkins wrenched the gun from Terry, thinking there was a street fight, Terry drew his bowie knife, and said, "D—n you, if it is kill, take that," and plunged it into Hopkins' neck its full length, severing the carotid artery, and producing a serious, and, as was then supposed, a fatal wound. Hopkins retreated down the street, and the law and order party sought refuge in the armory.



CONTACT WITH THE VIGILANTE POLICE. TERRY STABS HOPKINS. JUNE, 1896.

CHAPTER XIV.

VIGILANTES IN ARMS—SURRENDER OF THE BARRACKS TO THE VIGILANTES—JUDGE TERRY A PRISONER AT FORT GUNNYBAGS.

A mounted courier was dispatched to the committee rooms with the dread intelligence. The mounted battalion, in an incredibly short space of time, were on duty, and at once swept through the streets, and surrounded the office of the naval agent and armory, where Terry and his party had taken refuge. Company after company emerged from the committee rooms under arms, and were marched off to their various destinations. In less than an hour four thousand men were under arms, and the streets were glistening with bright bayonets, and, before the "law and order" party could realize their condition, their armories were completely surrounded. By 4 o'clock eleven hundred armed men had surrounded the armory where Terry and his friends were, and every approach to the building had been cut off. A delegation from the Executive Committee, consisting of Messrs. Truett, Tillinghast, Smiley, Vail, and Dempster, arrived about 4 o'clock.

Dr. Ashe, who had temporary command of the armory, appeared at the window with a message from the refugees, and asked for a conference as to the terms of capitulation. The Vigilantes demanded, first

of all, the surrender of Judge Terry and Reuben Malloney. At this instant Judge Terry appeared in person at the window, and attracted the attention of Colonel Olney, of the Vigilantes. He did not know but that Hopkins was dead, and, if dead, he knew what that meant. He began to realize the situation produced by his irritable spirit, and he addressed his friends, saying: "This is very unfortunate, but you shall not peril your lives for me. It is I they want. I will surrender to them."

"There is nothing else to do," replied Ashe, "but first let us try to escape the fury of this mob." While they were thus consulting, Chief Marshal Doane, of the Vigilance Committee, made a demand for the complete and absolute surrender of the armory and all persons therein, and the following correspondence took place:—

SAN FRANCISCO, June 21, 1856.

Gentlemen of the Vigilance Committee—

If the Executive Committee will give us protection from violence, we will agree to surrender.

R. P. ASHE, *Capt. Co. A.*,

J. MARTIN REESE, *1st Lieut. Co. B.*

The committee replied as follows:—

COR. DUPONT AND JACKSON STS., S. F., }
June 21, 1856. }

R. P. Ashe and J. Martin Reese, Commanding—

GENTLEMEN: We have to say, in reply to your communication of this date, that, if Judge Terry, R. S. Maloney, and John B. Phillips, together with the arms and ammunition in your possession, be surrendered to the charge of our body, we will give you and the building in which you now are protection from violence. Yours, by order of the Executive Committee, of which we are members,

Nos. 12, 13, 50, 645, 332.

An answer being required in fifteen minutes, it being now ten minutes to four.

To which answer was made:—

SAN FRANCISCO, June 21, 1856.

Gentlemen of the Vigilance Committee—

If you will agree to see that Judge Terry and Mr. Malloney will also be protected, while in your hands, from violence from persons outside of your organization, then we will agree to surrender on the terms of your note just received.

Respectfully, R. P. ASHE, *Capt. Co. A.*,

J. MARTIN REESE, *1st Lieut. Co. B.*

P. S.—Lieutenant Phillips is not with us.

This was answered as follows:—

SAN FRANCISCO, June 21, 1856.

To R. P. Ashe and J. Martin Reese, Commanding—

We agree to protect Judge Terry and S. B. Malloney from violence from parties outside of our organization, as proposed, and beg leave to remind you that the time proposed in our first note has already expired.

By order of the Executive Committee, of which we are members,
Nos. 12, 13, 50, 332, 645.

The surrender was complete, and, having no arms or armory, the organization was useless, and the officers and militia resigned. Terry was taken to the headquarters of the Vigilantes, and imprisoned, to await the result of the fearful wound inflicted upon Hopkins with the knife.

CHAPTER XV.

JUDGE TERRY'S VIEWS AS A DEFENDER OF THE LAW—
HIS UNYIELDING DEVOTION TO CONSTITUTIONAL
SUPREMACY—EXTRAORDINARY EXCITEMENT—COR-
RESPONDENCE.

Before presenting the official and other matters of correspondence, and consultations which took place in reference to the release of Judge Terry, a few words, which may serve to more clearly define the condition of affairs at this juncture, may be profitably supplemented. The committee was dealing with the criminal elements exclusively. Its province was not alone in the city of San Francisco, and yet that city was the harbor of refuge for the main actors in the drama. The newspapers, with the exception of one in San Francisco, and the people of the State as a rule, were in sympathy with the actions of the Vigilance Committee. One prominent leader of a band of desperadoes, whose operations were in the mountains and foothills, in robbing stages and stealing horses, kept posted in regard to the work of the committee, and, after most of the work had been done, the *Bulletin* gave a full list of the persons hung, transported, and otherwise dealt with, and, when this desperado read them, he remarked: "Not one innocent man has been punished. Every one of them were criminals."

Up to the moment when Judge Terry yielded to his impetuous nature, which was his most inveterate foe, he was as safe as any man in the State. He was not a criminal until that hour, and the encomiums that had been spent upon his name as an honest and incorruptible judge should have built about him an impregnable fortress, and caused him to rise superior to the questionable acts of outlawry that surrounded him. If he considered his presence as a supreme judge so august that criminals would be safe within it, he arrogated to his office and rank a greater influence than human patience under such trying circumstances would recognize. He was a strong Southern man in his prejudices, and was zealous in the support and defense of the State government of which he was a part; and, while he defended the Governor in his operations, and advised with him in his troubles, he was one of the few who had been true to his honor and dignity in the performance of duty. He agreed that politicians, judges, and juries had been corrupt, but he was just as sure that the men who established and were managing the Vigilance Committee had so persistently shirked jury duty and their duties at the polls that they had thereby become parties to the crimes which had caused the troubles they were then seeking to prevent.

Judge Terry was arrested and imprisoned on the twenty-first day of June, 1856, and, from that day until the day of his release, strenuous efforts were made by his friends to secure his release. The committee were troubled at his presence. The fate of Hopkins was trembling in the balance. Both parties secured the

most expert medical aid to save him. The Executive Committee of the Vigilantes used every effort to prevent any violence which was threatened by the four thousand armed members who were demanding the life of Judge Terry. They had determined that no distinction should be made in dispensing justice. In their search for small fish of the criminal order they had caught a whale, and they were perplexed. His wife, who was beloved by all for her many virtues and her moral worth, was admitted to his cell, and around her at all times were gathered the most prominent of his ardent friends.

Volney E. Howard, who, although the State militia had practically disbanded, still assumed the position of major general, overstepped the bounds of prudence by addressing a letter to the Executive Committee, in which he committed the error of manufacturing a story of the stabbing not in line with the facts. His letter was as follows:—

HEADQUARTERS, SAN FRANCISCO, }
June 21, 1856. }

To W. T. Coleman, and others, styling themselves the Vigilance Committee—

GENTLEMEN: I learn that a person named Hopkins, claiming to be under your authority, a short time since visited the room of Hon. David S. Terry, in this city, rushed upon him, and attempted to disarm him, and otherwise assaulted him. Judge Terry, in self-defense, was compelled to use a knife, with which he inflicted a severe, and perhaps a mortal, wound. From all the circumstances, as detailed to me, I have no doubt that, should Hopkins unfortunately die, it would be a case of justifiable homicide.

I am informed that Judge Terry is now in the hands of the police, and that the house in which he is situated is surrounded by a large armed force under your orders.

I demand that the force be withdrawn, and that Judge Terry be left in the custody of the officers of the law; and I pledge myself that he shall be held in safe custody to abide his trial and all legal proceedings. This is the only course which will avoid an immediate collision of arms involving the peace of the State.

VOLNEY E. HOWARD,

Major General 4th Div. Commanding, S. F.

B. W. LEIGH,

Acting Aid-de-Camp.

No attention was paid to this. The friends of Terry, after having exhausted their devices in order to secure his release, prevailed upon him to address the committee. He did not relish the idea, but finally did so, in the following language:—

SAN FRANCISCO, June 24, 1856.

To the Executive Committee of Vigilance—

GENTLEMEN: I desired to see Mr. Crittenden for the purpose, amongst other things, of requesting him to say to you, on my behalf, that I have a wife and child dependent on me for support; that my personal affairs are complicated and involved, and, as I have never confided my business to others, it cannot be readily understood and settled except by myself; that, if deprived of an opportunity of giving them my personal care, for say two weeks, I believe no agent or order could or would save anything for my family, whilst I would be able in the above time to settle with all creditors, and insure to them a modest competence.

For the purpose of insuring to my wife and boy a support in case by your verdict they were deprived of my protection, and also of giving me an opportunity of vindicating my fair name, which is dearer far than life, I request that the charges be submitted to a legal tribunal in this city. The judges of the criminal courts are here, I believe, allowed by you to be honest in this case. You, by your power and influence over Scanwell, could secure what you would consider an honest and intelligent jury; or, if you distrust Scanwell, I will agree that the jury may be summoned by a person named by yourselves, and for whose honesty you will vouch. I will interpose no delay except as

above stated; will make no application for a change of venue or for bail, and will object to no juror because he is a member of your body or organization, for, although the present Vigilance Committee are naturally much incensed against me, yet I will be content, after a few days to give time for reflection, to submit my cause to a jury composed of honest men, though all may be members of the Vigilance Committee.

I will further agree that, if death should ensue from the wound inflicted by me, I will at once resign my position, will make all the necessary arrangements, and, if acquitted, will at once leave the State, should you require it.

I make this request solely for the reason that I do not wish to leave my family dependent on the charity of others. For myself, I have sufficient fortitude to endure without flinching any fate which providence may have in store for me.

If you do not grant the above request, I suggest that as to some of the specifications against me transpiring years since and at a distance, the witnesses are not forthcoming at this instant, but are near by in San Joaquin County. I desire time as to those charges (say two days) in which to procure those witnesses, as well as the most respectable gentlemen in Stockton from all sections of the Union, to refute the aspersions upon my character.

I submit the foregoing for your consideration. I am not personally acquainted with any of you, but am informed that your body is composed of men of honor. If so, you desire only to do justice, and I think no injustice can be done by pursuing the course I have indicated. Respectfully, etc.,

D. S. TERRY.

CHAPTER XVI.

EXTRAORDINARY EFFORTS TO SECURE TERRY'S RELEASE —COMMANDER BOUTWELL AND CAPTAIN FARRAGUT—TERRY'S APPEAL TO BOUTWELL—BOUTWELL TO FARRAGUT AND THE LATTER'S PATRIOTIC RE- PLY.

The release or capture of Terry was the all-absorbing thought and the center of every movement. The wildest stories seemed to prevail as to the manner and mode of his release. Letters to the Vigilantes from all quarters came and were considered by the committee. Failing in securing a release by his personal letter, he appealed to Boutwell. The Governor, J. Neely Johnson, addressed a strong appeal to C. B. Boutwell, commanding the United States ship *John Adams*, lying in the Bay of San Francisco. The letter recited the fact that David S. Terry was in the hands of a body of Vigilantes, and he believed his life to be in imminent peril from the lawless violence of said committee; that he was powerless to protect him from such threatened violence.

"Wherefore," said the Governor, "in the name and by authority of the power vested in me as Governor of the State of California, I ask at your hands, and with the power and means under your command, the protection and security of said David S. Terry from

all violence or punishment by said committee or any other power, except such punishment as may be inflicted on him in due course of law.

“In testimony, etc., J. NEELY JOHNSON.”

Terry finally concluded to make a patriotic appeal to Commander Boutwell, hoping to arouse his pride, not knowing that Boutwell's actions were subject to the orders of Captain D. G. Farragut, who was in command of the Pacific squadron at Mare Island. He addressed a letter to Boutwell as follows:—

SAN FRANCISCO, June 28, 1856.

SIR: I desire to inform you that I am a native-born citizen of the United States, and one of the justices of the Supreme Court of the State of California, and that, on the 21st day of June inst. I was seized with force and violence by an armed body of men styling themselves the Vigilance Committee, and was conveyed by them to a fort which they have erected and formidably entrenched with cannon in the heart of the city of San Francisco, and that since that time I have been held a prisoner in close custody, and guarded day and night by large bodies of armed men, with muskets and bayonets, by order of the said committee. I desire further to inform you that the said committee is a powerful organization of men, acting in open and armed rebellion against the lawful authorities of this State; that they have resisted by force the execution of the writ of *habeas corpus*, and have publicly declared through their organs that their will was the supreme law of the State.

The government of the State has already made ineffectual efforts to quell this rebellion, and the traitors, emboldened by success, have already hung two men and banished a great many others, and some of their members now openly threaten to seize the forts and arsenals of the United States, as well as the ships of war in port, and secede from the Federal Union.

During my imprisonment I have suffered the indignity of being handcuffed by these rebels, my friends are denied all access to me, and all kinds of terrorism are resorted to to compel me to resign

my office. I desire further to inform you that said committee is now engaged in trying me as a criminal for attempting resistance to their authority, and also for an assault with intent to kill one of their men here, whilst I acted solely in self-defense of my own life against their assaults on the public streets, and that I am in hourly danger of suffering an ignominious death at the hands of these traitors and assassins.

In this emergency I invoke the protection of the flag of my country. I call on your prompt interference with all the powers at your disposal, to protect my life from all impending peril. Let me remind you of the conduct of the noble and gallant Ingraham, when the life and liberty of a man only claiming to be an American citizen was concerned. From your high character I flatter myself that this appeal will receive your early and favorable consideration.

I am, very respectfully, your obedient servant,

DAVID S. TERRY,

Justice of the Supreme Court of the State of California.

Acting upon this, Commander Boutwell addressed the committee as follows:—

UNITED STATES SHIP "JOHN ADAMS," }
San Francisco, Cal., June 28, 1856. }

GENTLEMEN: You are either in open rebellion against the laws of your country, and in a state of war, or you are an association of American citizens combined together for the purpose of redressing an evil, real or imaginary, under a suspension of the laws of California. If you occupy the position assigned to you by Judge Shattuck, one of your ablest judges, and one who sympathizes with those who wish to reform abuses under the law, I, as an officer of the United States, request that you will deal with Judge Terry as a prisoner of war, and place him on board my ship. But if you desire to occupy the position of a body of citizens acting under a suspension of, or against the law of, California, you will, I think, on reflection, and from a desire to conform to the requirements of the Constitution of your country, from a due regard to justice, and, above all, from a desire to avoid the shedding of American blood, by American citizens, on American soil,

surrender Judge Terry to the lawful authority of the State. You, gentlemen, I doubt not, are familiar with the case of Kostza. If the action of Captain Ingraham in interfering to save the life of Kostza, who was not an American citizen, met the approbation of his country, how much more necessary it is for me to use the power at my command to save the life of a native-born American citizen, whose only offense is believed to be in his effort to carry out the law, obey the Governor's proclamation, and in defense of his own life. The attack of one of the Vigilance Committee, who, perhaps would have killed the judge if the judge had not wounded his adversary, was clearly without the sanction of law.

Gentlemen of the committee, pause and reflect before you condemn to death, in secret, an American citizen who is entitled to a public and impartial trial by a judge and jury recognized by the laws of his country. I trust you will appreciate my motives and consider my position. I most earnestly pray that some arrangement may be effected by which the peace and quietude may be restored to the excited community.

I have the honor to be, etc.,

E. B. BOUTWELL, *Commander.*

To the Executive Committee of Vigilance.

To which he received the following reply:—

EXECUTIVE COMMITTEE CHAMBERS, }
San Francisco, June 28, 1856. }

DEAR SIR: Your communication under even date with this was received a short time since, and I am directed by the Executive Committee to state to you that its contents will receive due consideration.

I am, sir, respectfully, your obedient servant,

“33 SECRETARY.”

Boutwell was deeply cut by the curt reply, and wrote a letter to the Governor, in which he said: “I am sorry to be compelled to inform you that the unanimity with which the people of San Francisco deprecate any interference on the part of the Federal government

with their affairs would, I think, were it to interfere, do much injury, endanger the life of Judge Terry, and delay the settlement of the unhappy controversy now existing between the State government and a large proportion of the citizens of the city of San Francisco. I understand that the condition of Mr. Hopkins is improving, and in a few days more he may be so far recovered as no longer to afford the Vigilance Committee any excuse for keeping the judge in custody. . . . If I could persuade the committee to set Judge Terry at liberty I would be most happy to do so. If Hopkins dies, and the committee condemn him to death, I will make an effort to save his life in such a manner as not to be offensive to my fellow-citizens."

When Boutwell reminded them of the first communication, the committee replied:—

We have submitted the whole correspondence to your superior officer, Captain D. G. Farragut.

Shortly after this Boutwell received the following letter from Farragut:—

MARE ISLAND NAVY YARD, July 1, 1856.

DEAR SIR: I yesterday received a communication from the Vigilance Committee inclosing a correspondence between yourself and the committee in relation to the release of Judge Terry, and requesting my interposition. Although I agree with you in the opinions therein expressed in relation to constitutional points, I cannot agree that you have any right to interfere in this matter, and I so understood you to think when we parted. The Constitution requires, before an interference on the part of the general government, that the Legislature shall be convened, if possible, and, if it cannot be convened, then upon the application of the executive. Now, I have seen no reason why the Legis-

lature could not have been convened long since, yet it has not been done, nor has the Governor taken any step that I know of to call them together.

In all cases within my knowledge the Government of the United States has been very careful not to interfere with the domestic troubles of the States, when they were strictly domestic, and no collision was made with the laws of the United States, and they have always been studious in avoiding, as much as possible, a collision with State's rights principles. The commentators, Kent and Story, agree that the fact of the reference to the President of the United States by the legislative and executive of the State is the great guarantee of State's rights.

I feel no disposition to interfere with your command, but, so long as you are in waters of my command, it becomes my duty to restrain you from doing anything to augment the very great excitement in this distracted community until we receive instructions from the government. All the facts of the case have been fully set before the government by both parties, and we must patiently await the result.

Very respectfully, your obedient servant,

D. G. FARRAGUT,

Commander Mare Island.

*Commander E. B. Boutwell, commanding United States ship
"John Adams," California.*

P. S.—We must not act except in case of an overt act against the United States.

D. G. FARRAGUT.

CHAPTER XVII.

HOPKINS REPORTED DYING—TERRY WRITES A LETTER TO HIS WIFE—JUDGE McALLISTER REFUSES TO ISSUE A WRIT OF HABEAS CORPUS—IMPORTANT ACTION OF CONGRESS IN TERRY'S BEHALF.

Under date of July 5, 1856, when it was reported that Hopkins was dying, Judge Terry, knowing the consequences of such a fatal result, wrote a letter to his wife, in which, among other things, he said:—

By the death of my mother I was left, at the age of thirteen years, to my own guardianship, my only counselor, who had influence with me, being my brother, who was about two years older than myself. From that age I counted myself a man, and associated with men—aye, and played a man's part in the struggle which secured the independence of Texas. Acknowledging no control upon my actions, I could not sink from the soldier into the schoolboy, so, what education I have acquired, above that which a boy of twelve years gathers at common schools, I acquired by reading at home all the books I owned or could borrow during the time I was not engaged on the frontier. . . .

If I am guilty of any crime I would not falter, but upon this point I am invulnerable. I know that I acted, not from any feeling of malice toward any human being, but solely from regard to a sacred principle, from the desire to prevent the consummation in my presence of an act which, though it may have been attempted from good motives, and would certainly have worked no injury to the community, as the man sought to be removed was a bad man, was, nevertheless, a violation of the Constitution of this State, which I had sworn to support, as well as the Constitution of the United States, to secure the blessings of which

to their posterity both of my grandfathers fought and bled and toiled and suffered.

I was taught to believe that it was the duty of every American to support the Constitution of this country; to regard it as a sacred instrument, not to be violated in the least provision, and, if necessary, to die in its defense. The meanest criminal is, under that provision, guaranteed the same rights as the noblest citizen, and cannot, without a violation of its provisions, be deprived of his liberty, except by legal process. It was at this holy principle, and the obligations of my oath, that I looked, and not at the demerits of the man, whom I knew to be a bad man; and I believe that even those who are my self-constituted judges will do me the justice to think I would not defend that man for his own sake.

On the sixth day of July, and while the fate of Hopkins was the exciting problem of the hour, a committee of Terry's friends, headed by Treasurer of State S. H. Brooks, visited Judge McAllister, of the United States Circuit Court, and appealed to him to issue a writ of *habeas corpus* in behalf of Judge Terry, but he refused, stating that he "was unwilling to provoke the animosity of the people." Had he known that the Executive Committee were hoping and praying for just such action to be taken to relieve them from the embarrassing situation in which they were placed, he would have conferred a favor which they would have been too ready and willing to grant.

The government officials were seeking in every way to avoid a conflict between the State and Federal authorities, and this refusal on the part of Judge McAllister gave color to the belief that the Federal authorities were in sympathy with the Vigilantes, backed as it was by the action of Farragut in withholding Boutwell in his desire to turn the guns of the *John*

Adams on Fort Gunnybags. The committee had concluded that such a writ was inviolable under the circumstances, there being no occasion for disobeying such an order in the absence of martial law. State officers had been shown great consideration by the committee, and had been admitted into the presence of the Executive Committee. McAllister was not informed of this, or he might have exercised his judicial functions without "provoking the animosity of the people."

Colonel Zabriskie, General Jas. Allen, and Dr. C. B. Zabriskie, made a proposition to Judge Terry, which must have had the concurrence of the Executive Committee of the Vigilantes, that, upon condition that he be set at liberty, he resign the office of associate justice of the Supreme Court. This proposition was conveyed to him by his wife, who opposed it with all the ardor of her nature. "Why," said she to these gentlemen, "the moment he resigns his position he will become a mere citizen, and *then* they will hang him." However, she carried the proposition to him, and he returned the following laconic reply: "If I leave this building alive, I shall leave it as justice of the Supreme Court of this State, and no power on earth can make me change this resolution."

The Texas Legislature prepared a memorial to Congress, which was presented by Hon. Samuel Houston, praying that, if the Federal government or Congress could consistently interfere in his behalf, it would do so. In presenting the memorial, Houston stated that, while in Texas, Judge Terry had borne a high character as an honorable man, and was

an ornament to the community in which he lived. Brown, his contemporary in the Senate, stated that "a more honorable man than Judge Terry did not breathe the air of heaven. He had known him from infancy, and his parents before him, and all his connections. There was not a blemish on his character."

Senator John Bell, of Tennessee, bore testimony to his high character, but alleged that it was a rash impulsiveness of nature that got him into this trouble. It was John B. Weller, then in Congress, who said: "Judge Terry is an honorable, high-minded, prudent man, who felt bound to use the whole of his moral influence in favor of sustaining the laws."

Weller might have spared that word "prudent" without a blemish on his meed of praise, but that Terry was excessively imprudent, no one knew better than himself. He overstepped the bounds of prudence on every occasion in which his spirit and energies were aroused, and that he was a dangerous man on such occasions, every act of his life gave testimony.

CHAPTER XVIII.

CONFERENCE BETWEEN THE LAW AND ORDER FORCES AND VIGILANTES—GWIN AND FARRAGUT APPEAL FOR TERRY'S RELEASE—EXTRAORDINARY AND EX- CITING EVENT BETWEEN FARWELL AND FARRAGUT.

The following incident is from the pen of James O'Meara, one of the men present at the conference of which the article treats, and shows to what extent the friends of Terry were willing to go in order to procure his release and save him from the punishment which the death of Hopkins, then hourly expected, was sure to bring about:—

“David F. Douglass was secretary of State. He had been elected as a Know-Nothing on the same ticket with Terry and Governor Johnson. He had been a Whig with Terry, but, being a Southern man, his associations were mostly with Democrats of the Southern school. He was one of the most vehement denouncers of the Vigilance Committee, and took sides with Captain (later General) W. T. Sherman, Volney E. Howard, and others of the ‘law and order’ leaders. He was deeply attached to Dr. Gwin, then a candidate for re-election to the United States Senate. Gwin had taken no part in the domestic controversy, although he was friendly with the ‘law and order’ element, as any good citizen would be who had a

limited knowledge of the condition of affairs. Douglass, therefore, felt convinced that, above all other men, ex-Senator Gwin would be the most influential in adopting measures leading to the release of Judge Terry from the prison of the Vigilantes, or at least to prevent his execution in the event of Hopkins' death.

"But between Dr. Gwin and Judge Terry there existed a feud that quite forbade the interposition of the powerful ex-Senator in Terry's behalf. Douglass, however, succeeded in overcoming this difficulty, and finally persuaded Dr. Gwin to rigorously exert his best efforts in aid of the committee's distinguished prisoner, who was kept in close confinement within the narrow cell allotted to him in the second story of Fort Gunnybags. Dr. Gwin at once proceeded upon a plan of action he believed most likely to succeed. The *John Adams*, sloop of war, Commander Boutwell, was at that time anchored in the bay, in good range of the central part of the city. Boutwell was an outspoken denouncer of the Vigilance Committee, and it was reported currently on the street that he had declared that upon the first breach of the law upon the Federal authority, or upon the property or rights of the government by the Vigilance Committee, he would open the guns of the *John Adams* upon the city. But he was, nevertheless, under the orders of Captain Farragut, then in command at Mare Island, and the ranking officer of this port. This reported threat of Commander Boutwell had wrought great indignation and bad blood among the Vigilance Committee members and sympathizers, and some were desperate enough to aggravate a clash and defy this

high-tempered officer, but the cooler heads and controlling minds of the organization and in the community prevented so grave a procedure in which so many valuable lives would surely have been sacrificed. Dr. Gwin and Captain Farragut were warm friends, and the ex-Senator felt that the gallant naval chief was the very best man for the emergency. He induced Appraiser-General Samuel P. Bridge to repair to Mare Island to bear to Farragut an urgent letter, requesting his presence in San Francisco at the very earliest moment, on a matter of which he would then be personally informed. General Bridge took the steamboat for Mare Island Tuesday morning. On Wednesday he returned with Farragut, who proceeded at once to the rendezvous appointed by Dr. Gwin, who was there to meet him. After an hour's interview with the commander, Dr. Gwin sent for General Bridge and James O'Meara (the writer), and desired them to invite four of the Vigilance Executive Committee, naming only two of the four, Jas. M. Dows and Nicholas O. Arrington, to attend a private conference at the rooms of General Bridge in the custom house, at 2 o'clock that afternoon. T. W. Farwell, a hardware merchant, and Chas. Hutchins, of the Boston house of Davitzer & Hutchins, were the other two invited. At the appointed hour the eight men met in General Bridge's room. There were present on the side of the law and order, Dr. Gwin, Commander Farragut, General Bridge and James O'Meara; of the Vigilance Executive Committee members, the four just above named. Dr. Gwin explained the object of the meeting, and Mr. Dows re-

sponded in a long statement as to the situation in the Executive Committee. He stated that the committee had organized 'to hunt down and drive away or kill off a lot of villainous coyotes, but they had unexpectedly trapped a grizzly bear, and they were worst puzzled how to get rid of him than anybody on the outside could possibly imagine.' 'It was the constant hope and hourly prayer of the Executive Committee,' he went on to say, 'that Hopkins would recover, for they dreaded the consequences most likely to follow his death, and trembled at their own position. The committee was not its own master; its members were but thirty-six strong, while behind them, and in effect controlling or forcing their action, stood six thousand armed men, many of them reckless and hasty, some of them foreigners who did not speak the English language, and all of them clamorous for the execution of Judge Terry in case Hopkins should die. The Executive Committee were themselves actually powerless to guide or restrain these six thousand armed and resolute men, who insisted that no distinction should be made in dealing with the Caseys, the Coras and others of low degree, and such a distinguished prisoner as the judge of the Supreme Court, already in their remorseless clutches. The lives of the Executive Committee were threatened by these men should Terry be permitted to escape from his prison in Fort Gunnybags, and the members were only too strongly convinced at that time that this was not an idle threat, or one to be disregarded.'

"This substantially was the terrible dilemma of the thirty-six Executive Committee men, and Mr. Dows

was not well satisfied in his own mind that there were not, in the executive body itself, men who felt very much in consonance with the six thousand and their outside sympathisers. After he had thus expressed himself, Captain Farragut explained his presence and desire at the conference. He presented the case with remarkable clearness, and adverted to the frightful consequences certain to be visited upon the entire State, and upon San Francisco particularly, concerning the growth and future of each, the evil name that would be fastened upon California and this city at the East, in Europe, and throughout the world, should the lawless organization put to death one of the highest judicial officers of the State; and the disastrous effects of the violent deed in every conceivable aspect were depicted by him with great force. He then answered a question by Mr. Hutchins, relative to the reported threat of Commander Boutwell, stating that as the latter was subject to his orders no fears of the fulfillment of the menace—granting it to be a fact—need be apprehended. And next he proceeded to the proposition he had deliberated upon for the consideration of the Executive Committee, it to be communicated to that body by the four members present. It was that the person of Judge Terry should be delivered to an officer of the *John Adams*, who should be directed to receive him on board the war ship's gig at the foot of Market Street wharf at midnight; that the vessel should convey Terry at once to Mare Island, and that there, before he should permit the judge to go on shore, he, Commander Farragut, would exact from him a promise that he, Terry, would

go into the interior of the State, remain there for not less than six months, refraining all the time from either speech or action calculated to arouse his friends or the public to any movement against the committee, and neither to sit upon the bench nor visit San Francisco until the excitement had entirely subsided.

“To this Mr. Dows replied that the committee had no knowledge of the conference; that himself and his three associates present were in no respect empowered to act in the matter; that the proposition would, as a matter of course, have to be submitted to the Executive Committee for determination; and he remarked further, that, while he was exceedingly anxious to have Terry out of the hands of the committee, he thought that the proposition would not be approved at the committee room, for the reason that the executive body had already before them the proposition of Judge Terry himself as to his case, which to him seemed more likely of acceptance than that which Captain Farragut had offered. Then, stating the details of that proposition, he closed by saying that the Executive Committee had evinced such spirit in the matter as to convince him that even it would be rejected. Dr. Gwin and Commodore Farragut therefore more earnestly urged the imperative necessity of Judge Terry's release, and insisted that in no event must his execution be ordered by the committee, and to more deeply impress the four committee men with the awful gravity of any such extremity of punishment, and of the fearful responsibility that would rest upon every one of them, and their associates of the Executive Committee, Commodore Farragut alluded to the

possibility of the interference finally of the Federal authority. His speech was impressive, his manner most earnest, and all present were visibly moved by it except Farwell. He seized the opportunity, the moment the commodore had concluded, to rise and speak his sentiments. He was rash, impetuous, defiant, and almost insolently reckless of speech, and of superior authority from any quarter. He went on to declare, with loud voice and offensive manner, 'that the Vigilance Committee was a commanding and invincible power; that it had mastered the city government; that it had compelled Governor Johnson to back down and surrender the county prison and deliver up the murderers harbored there.' Then he exclaimed, or was exclaiming, 'And if the Federal government undertakes to interfere we will show its minions that we can whip——'

"He had no opportunity to utter another word. He had hardly managed to utter the last half dozen words of his extraordinary harangue and menace, for at the word 'minions,' Farragut leaped to his feet, and then it was those clear, deep blue eyes, in repose full of sweetness and light, flashed their fiery fury, and he looked the incarnation of the avenging custodian and majestic champion of his country's honor and might. He was actually a little below medium height and figure, but at that moment he seemed a giant of giants in the grandeur of his mighty rage, taller even than the towering ex-senator, who had also risen from his chair and stood erect to his full stature of six feet two inches, the personation of outraged dignity and terrible passion. Farragut's indignation appeared super-

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naturally grand, and it was as an overwhelming force that bore everything before it. His whole form was rigid with the sudden burst of nervous force, his usually mobile mouth was of steel, his face surcharged with the violence of his fierce emotion; but more dreadful and more electrifying than all was the "fire and fury" of his soul-subduing eyes, which until that instant had beamed so kindly and so gratefully in the course of the earnest but courteously-conducted conference. The cause and object of this magnificent anger seemed suddenly struck dumb; and then poured forth for but a moment his torrent of eloquence and burning denunciation, his fervid words of patriotic inspiration, his devotion to duty, and his fearlessness of anything in its faithful performance. It was as the burst of the hurricane; it leveled everything before it, and when the fury of its blast was over, when the hushed calm succeeded, there was no other sound. The conference wrought no good. Its members hurried away."

CHAPTER XIX.

HOPKINS PROVIDES FOR TERRY'S RELEASE BY GETTING WELL—TERRY IS TRIED BY THE COMMITTEE—EXTRAORDINARY PROCEEDINGS IN HIS CASE—HE IS RELEASED—UNWISE PROCEEDINGS BY HIS FRIENDS.

All efforts having failed to secure Judge Terry's release by his friends, it was left for his victim to furnish the avenue of escape. He had been nursed and attended by hands that would not have spent the time or wasted any sympathy over him but for the man who had inflicted the dangerous wound. Terry's life was of more value than that of Hopkins, and to avoid an atonement so deeply fraught with consequences that were sure to follow his death, tender hands administered to his wants with unusual anxiety. About the 15th of July he began to show symptoms of recovery, and in a day or two thereafter he was pronounced out of danger by the physicians. It was a day of rejoicing among the members of the Executive Committee of Vigilantes as well as among his friends. No sooner was the announcement made than the committee renewed the trial of the judge under the charges that had been preferred against him. The Executive Committee was composed of thirty-six members, and the findings of this committee, in all cases, were to be

passed upon and concurred in by a majority of a Board of Control, composed of one hundred members.

The first charge against him was that of resisting an officer of the committee while in the discharge of his duties. On this count he was found guilty, three-fifths being required to convict.

The second charge was that of assaulting Sterling A. Hopkins with a deadly weapon with intent to kill. On this count he was found guilty of simple assault.

The third charge was that of an assault on a man named Evans, on which count he was declared not guilty.

The fourth, fifth and sixth charges, which are not on record, were dismissed, being unsupported by any evidence.

On the seventh charge, that of an assault on J. H. Purdy with a deadly weapon, he was found guilty of an assault only.

As the charges on which he was found guilty did not amount to any violent execution, the greatest punishment being that of banishment, the committee concluded to pass upon him the following sentence: "That David S. Terry, having been convicted, after a full, fair and impartial trial, of the charges before the Vigilance Committee, and the usual punishment in their power to inflict not being applicable in the present instance; it is therefore declared the decision of the Committee of Vigilance, that the said David S. Terry be dismissed from custody.

"That, *Resolved*, In the opinion of the Committee of Vigilance, the interests of the State imperatively demand that said David S. Terry should resign his position as justice of the Supreme Court."

The decision was ordered read to the prisoner, and that he be discharged upon a ratification of the findings by the Board of Delegates of one hundred members.

On Friday, July 25, the delegates met, and, acting upon the findings of the Executive Committee separately, a motion to concur in the report as a whole was lost. The verdicts on each count were concurred in until the seventh, the assault upon Purdy, which was dismissed. At this meeting the action of the Executive Committee in the trial, together with the evidence and statement of Terry in his own defense, were presented to the Board of Delegates. No final action having been taken, the Board adjourned.

At a meeting on the 31st of July, ninety-two members of the Board being present, the question came up for final action, and it was "*Resolved*, The executive concurring, that he be banished from the State on the shortest possible notice, under the usual penalty" That penalty was death. The whole matter was then referred back to the Executive Committee, with the proposition that the Executive Committee and Board of Delegates meet in joint session and settle the vexed question.

The joint session met on August 5, and, after each had expressed their views, a vote was taken by the Board of Delegates on a motion to reconsider the sentence, which was carried, and the views of the Executive Committee were adopted by a vote of 44 to 36. On the seventh day of August a meeting of the Executive Committee was held, and it was resolved that the sentence be read to Judge Terry, and that he be forthwith discharged.

Considering the fact that Justice Terry was not a dishonest and disreputable character, no punishment in the scope of the committee could be inflicted, and yet it is strange that, after finding him guilty on three charges, he should be set at liberty. All other questions had sunk into insignificance, and the subject of his imprisonment as a representative of the State government, coupled with the words of Farragut, and the presence of the war ship *John Adams* and its threatening guns, probably had something to do with the peculiar verdict. Considering the obstinate determination of the Vigilantes as a body, it was a narrow escape, and, but for the cool judgment of W. T. Coleman and his influence as chairman of the Executive Committee, the sentence of banishment would certainly have been carried out. Terry's defense set forth the fact that he was not actuated by any desire to protect Malloney, as he had no doubt but that he was a man who ought to be punished, but that he was actuated solely by a desire to uphold the dignity of the Constitution and laws; that he was overcome by his passionate nature, and deplored the result as much as any man belonging to the Vigilance Committee.

After his liberation there were many who were bitter in their denunciation of the action taken, and, until he was safe on the *John Adams*, a conflict was feared. Letters were received by the Executive Committee from all parts of the State, both from members of the committee and friends who had extended their sympathies and their aid to the movement, some censuring and some complimenting the action of that body, but all inquiring as to the particulars which led to the final release of Judge Terry.

Without the Terry episode the reign of the celebrated Vigilance Committee would never have become an absorbing theme, and would have no interesting place in the history of the State, for the execution of Casey and Cora was but a matter of simple justice, outside of the ordinary process of the courts. The deliberate murder of James King was a tragedy which led to the purification of the social and political atmosphere of San Francisco, and permeated the State in its cleansing operations.

When Terry was liberated, he was conveyed to the United States sloop of war *John Adams*, and by it to a steamer bound for Sacramento. The transfer was made at 2 o'clock in the morning, which indicated that the committee was acting in opposition to some force which they feared. At the time of the transfer from the war ship to the Sacramento boat, Captain Boutwell, who commanded the *John Adams*, very imprudently made an exhibition of his feelings by ordering a salute of one gun and cheers from the rigging, as though in defiance and as a signal of victory.

Judge Terry was taken by the steamer directly to Sacramento, and here another indiscreet and irritating performance took place. He was taken from the steamer and escorted to the Orleans Hotel by a torch-light procession. Here he was tendered an ovation, and congratulatory speeches were made by Colonel E. D. Baker, Todd Robinson, Volney E. Howard, Vincent Geiger, and Horace Smith, and the feast and dancing were kept up until morning. A few days later he was in his place on the Supreme Bench with Justice Murray. Considering the fact that he had

only saved his neck by the superior physical endurance of Sterling A. Hopkins, these demonstrations were altogether out of place.

After he became a free man, and once more on the bench, various applications were made by his indiscreet and hot-heated political friends who were prominent in the counsels of the party, asking him to prosecute members of the Vigilance Committee, but he refused to have anything to do with it, expressing the opinion then, as he did in after years, that it had exerted one of the greatest moral and political influences for good in the State. David C. Broderick, then a power in the politics of the State as a leader, and as brave and intrepid in his dealings as he was unscrupulous in his methods, was a friend of Terry's and an enemy of the Vigilance Committee. While he did not make any personal warfare against the organization, being too crafty and too deeply absorbed in his own political aggrandizement, he contributed liberally to the fund that sustained the *Herald*, the only anti-Vigilante newspaper published in San Francisco, edited by a daring and outspoken writer named John Nugent. He was particularly liberal in the defense of Judge Terry, and in after years this became a matter of public notoriety, and was acknowledged by Broderick, as the sequel will show.

CHAPTER XX.

HIS SERVICES ON THE SUPREME BENCH—HIS ASSOCIATES—THEIR CHARACTERISTICS—EVIDENCES OF HIS PECULIAR CHARACTER FOR INTEGRITY—EXPRESSIONS OF THE STOCKTON BAR.

Upon taking his seat as a member of the Supreme Court, Judge Terry was not out of his sphere. It was merely a step higher in the profession, and, in the nature of things, by virtue of his recognized abilities and integrity, he was eminently qualified to fill the position. The political reverses that had come upon the Democratic party had benefited the people, not only in him, but in all the elective offices of the State. He was now a man of mature manhood, and was fully armed with a knowledge of the law. He was the senior of the chief justice, and yet he was only thirty-two years of age.

He took his place on the bench in October, 1855, succeeding Judge Charles H. Bryan, who had been appointed by Governor Bigler to fill the vacancy caused by the death of Alexander Wells. The first opinion which Judge Terry delivered is reported in volume five of "California Reports," page 462, and the last decision of the court in which he took a part is found in volume fourteen, page 74, having resigned his position on September 12, 1859.

His associates, when he assumed the position, were

Hugh J. Murray, chief justice, and Solomon Heydenfeldt, associate justice. Judge Heydenfeldt resigned early in 1857, and was succeeded by Peter H. Burnett, and, Judge Murray having died in September of the same year, Stephen J. Field took his place. Judge Burnett's term expired in October, 1858, and Joseph G. Baldwin was elected to the position.

Judge Terry, during his official career, which lasted within a few days of four years, was variously associated with Judges Murray, Heydenfeldt, Burnett, Field, and Baldwin. All of these were men of great intellectual force, scholarly attainments, and legal learning. Murray was an intellectual prodigy, elevated to the bench at the early age of twenty-seven years, and of habits of life which were not calculated to aid their possessor in judicial research, yet his opinions are models of perspicuity. Of him it was said by Judge Terry, in the proceedings of the court had upon his death, which cut him off at the early age of thirty-two years: "As a judge he was great, impartial, and fearless. As a man he was remarkable for the possession of social qualities which won in a peculiar degree upon the confidence and affections of his associates. He was frank, candid, and ingenuous almost to a fault, generous to prodigality, and firm and faithful in his friendships."

Judge Baldwin had a high reputation as a lawyer, and had also distinguished himself in the field of letters, being the author of "Party Leaders," and of "Flush Times in Alabama and Mississippi," the latter a book of the most exquisite humor. He was a most delightful companion, and had an inexhaustible fund



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of anecdote. Judges Heydenfeldt and Burnett were also men of distinction, the first named being a prominent attorney before his appointment to the bench. The latter was the first governor of the State, and is still living in San Francisco, venerated by all who are so fortunate as to be in the charmed circle of his acquaintance. Of Judge Field, whatever opinion may be entertained of his integrity, there is but one opinion as to his ability. Judge Terry once said to a particular friend that there was no man living who could give better reasons for a wrong decision than Field; and, further, that "he never decided a case against a corporation in his life." It was also said of him, by one who is himself a distinguished jurist of this State, at one time chief justice, and at present on the bench, that "he is the ablest man that lives, ever had lived, or ever would live." This, of course, is admiration expressed without limit.

The opinions of Judge Terry are characteristic of the man. Plain and simple in his habits of life, he despised pomp and display. He decided the cases that were submitted to him, and did not attempt to write treatises, which should be published at the State's expense, in every decision which he rendered. As a consequence, his decisions are short and pointed. Like everything he said, they are so plain that a "wayfaring man, though a fool, can read and understand." He stuck to his text, and, being a man possessed of a singular power of directness, he went straight to the meat of the proposition. His ideas upon the practice of judges introducing extraneous matter into their opinions, and hazarding conjectures

as to what the law would be under given conditions, are set out with characteristic force in his opinion on the once celebrated case of "Warner *vs.* The Uncle Sam," Ninth California, page 732. This was a case involving the question as to whether or not in certain cases the Federal courts had exclusive jurisdiction. In his remarks upon the dicta of judges to that effect, he said: "The loose expressions of the Federal judges occurring in opinions involving other and very different issues, cannot be regarded as authority upon the question of jurisdiction. There is often contained in the published decisions of courts two different kinds of opinions, judicial and extra-judicial. A judicial opinion is one that is on the question before the court. It is the direct, solemn, and deliberate decision of the court upon the issue raised by the record and presented in the argument. Such an opinion is absolutely binding on all subordinate tribunals, and is received as authority in courts of co-ordinate jurisdiction. An extra-judicial opinion is an opinion given on a question not necessary to decide in the case in which it was given. . . . Such opinions are regarded as the mere gratuitous expressions of the judge pronouncing the judgment, and not as the deliberate ruling or opinion of the court; and, though the well-established reputation for learning and ability of the judge in whose opinion they occur may in some cases entitle them to respectful consideration, they have never been regarded as authority."

In his opinion in this case, Judge Terry, who was a firm believer in the doctrine of State's rights, or rather the construction of the Constitution as given by Cal-

houn, said: "The several States of the Union are sovereign, and endowed with all the attributes and rights of independent States, except such as by the Constitution have been surrendered to the United States, or prohibited to the individual States. Among the attributes of sovereignty is the power and jurisdiction to determine fully all controversies affecting the rights of her citizens. This power has not, as we have endeavored to show, either expressly or by necessary implication, been taken away, but remains in full vigor in the State government. Jurisdiction in certain cases was given by the Federal Constitution to the United States courts, but the grant contains no words of exclusion nor any evidence of an intention to take from the tribunals of the several States the powers which were vested in them."

This opinion was rendered in 1858, and was the view taken by the followers of Calhoun, or those who contended for the strict construction of the Constitution. The controversy which had long been carried on in the judicial forum and in the Senate, was, in 1861, transferred to the camp and settled by the arbitrament of war. Since that time the doctrine of State's rights has never been asserted, for the last vestige and shadow were taken away by the laws of Congress passed in 1875, by the terms of which any action commenced in a State court, can, upon application, be transferred to the Federal court, which has the sole right to decide questions of jurisdiction.

About the time Justice Field wrote his decision upon the legal tender act, which won for him the gratitude and affection of the people of the Southern

States, he told Judge Terry that his views expressed in the Warner case were correct, and he was sorry he had not concurred with him, to which Terry replied: "Had you done so, you would never have been on the Supreme Bench of the United States.

At that time there were many cases arising out of political complications, and the first one which Judge Terry was called upon to examine was one involving the legality of the election of a county judge in Calaveras County to fill a vacancy caused by the death of that officer. A special election had been ordered by order of the Board of Supervisors and an election held without notification of such vacancy having been sent to the Governor. A contest was made and the case came before the Supreme Court. The court below had decided that the election was not valid in the absence of a proclamation by the Governor, and further that under the Constitution and laws the Governor must appoint the judge to fill the vacancy until the next succeeding general election. In his opinion Judge Terry affirmed the decision of the court below, and Judge Heydenfeldt concurred. Chief Justice Murray dissented, stating that the people are, in their sovereign capacity, greater than the law when in the regulation of their domestic affairs and not in conflict with justice. It was a popular idea, but it contravened the constitutional provision. It was the doctrine of popular sovereignty brought down to a narrow limit, and was only objectionable because it did not follow in the line of the strict constructionists to which school Terry belonged. Terry was above any narrow special pleading and confined himself to the letter and spirit of the

Constitution. In all his official acts he was with the people almost to a fault, but he had a reverence for the Constitution and laws, considering himself the custodian of justice, which permitted of no partiality in construction and opinion when the letter was at fault in expressing the spirit.

Justice Terry was especially severe on pettifogging and sharp practice in the profession. A case came before the court where default had been taken and allowed by the lower court through a mistake by inadvertance made by an attorney in the allegations of a complaint. The lower court had refused to allow the attorney to cure the defect by an amended complaint, and upon this ruling the case was appealed. In his opinion Judge Terry said: "Such a defect cannot be cured by a default taken against a defendant through such mistake or inadvertance of counsel." The decision was reversed and the case remanded for a new trial, with costs. The decision states that, "in the construction of a statute, the intention of the Legislature must govern, and this must be ascertained, not from a particular section, but from the whole statute."

In all his decisions he was brief and clear. No more truthful and just encomium could have been uttered than that embodied in a resolution of the Stockton bar after his death, and which is applicable here:—

"That as a judge he was great and pure; his judicial life is immortalized in his opinions which have become a part of the commonwealth, embodied in the reports of the Supreme Court of the State, where they shall stand forever, reflecting luster upon his career as a

judge, without stain and above reproach; that he was a man of pre-eminent mental endowments, and that he stood intellectually easily in the front rank of the distinguished men who have, by their services, rendered the history of the western slope of the continent illustrious."

CHAPTER XXI.

TERRY'S DISGUST FOR POLITICS AND POLITICAL METHODS—THE VALUE HE PLACED UPON JUSTICE—INCIDENTS OF HIS HONESTY IN THE FACE OF THE TEMPTER—STRONG SOUTHERN VIEWS.

One peculiarity and redeeming virtue which he possessed was a strict and undivided application of his energies and talents to the conditions before him. While a judge he was not a politician. The seething whirl which was lashing the populace in the mad endeavor for place never called him from the bench to the forum, and he took no part in the heated, exasperating and disgraceful conflict which was raging during all this time between Gwin and Broderick. The dignity of the position which he held, required that sublime dignity which he possessed to fill. In all respects he was equal to the occasion. His undeviating honesty and impenetrable mould of dignity was the shield which kept him above and beyond the exciting and irritating flood of political controversy. He sank the politician in the judge, and in his decisions he had no friends to reward, nor enemies to punish. In the Supreme Court reports, from volume five to fourteen, covering a space of four years, he has left the impress of his judicial mind. They are models of condensation, and marvels of simplicity.

The enactment of the fugitive slave law in 1850 drew a very marked and irritating chord between the proslavery and antislavery elements of the South and North, bringing to the surface a divided sentiment and drawing the line more distinctly, creating a bitterness of feeling, and much strife and contention. Open and avowed enemies of the law sprang up where least expected, and a milder name than that of "abolitionist" was assumed by men of prominence by the substitution of "Free Soilers." The tender Southerner, wedded to slavery, nursed his prejudices with all the nervousness that he possessed, and every event which encroached upon the rights of the master to his human chattel was jealously watched, and promptly resented. California was not altogether free from the excitement that prevailed at this time, and a case found its way before the Supreme Court while Terry was on the bench. All the judges were men of Southern birth and education, and were nurtured in the belief that slavery was a divine institution. The following brief reference to a decision delivered by Associate Justice Burnett, and concurred in by Justice Terry, is taken from an article from the pen of E. G. Waite, now Secretary of State, and published in the *Overland Monthly* of October, 1889:—

"Stovall, a young man in poor health, had brought his slave Archey with him to this State. Archey had assumed to be free. A case was brought before the Supreme Court. Burnett wrote the decision. After citing the law and precedents, the learned judge says there are but two exceptions to the general rule, by virtue of which a slave can be taken to a free State, and not

be a free man. A traveler has the right to take his slave in transit, and a visitor is granted the privilege by comity. But, says the learned judge, it will be seen by the reasoning that the slave in this case does not come under either of the exceptions; but as his master is sick, we will not draw the line very closely this time, as it is the first instance, but shall rigidly adhere to the rules hereafter. Jo Baldwin, himself a Virginian, afterwards chief justice of this State, wittily said of this decision, that it gave 'the law to the North and the negro to the South.' Judge Terry concurred in the decision, but added that in his opinion this master lost none of his rights to the slave if he went to work to obtain a support while sojourning in a free State. It is difficult to tell where such a doctrine, carried out to all its logical consequences, would end; certainly, it is more far-reaching than the Dred-Scott decision, made soon after, which only affirmed the right to take slave property into Territories.

"Judge Terry was a believer in African slavery, and had little patience with anyone who was not. His reasoning and sense of justice were warped to suit that belief. But should not the mantle of charity be flung over him, when in Northern pulpits at that time reverend divines preached in favor of the institution from the texts, 'Cursed be Canaan,' and 'Servants obey your masters,' as commands from on high applicable to American slavery, while all around them lived souls imbued with a diviner sense of right than the God these sacred teachers affected to worship? Terry never had such advantages, and came nearer guiding himself by the best light he had,"

Judge Terry was radical. He was opposed to compromising his opinions and his beliefs in order to evade or lighten the weight of law and justice. In modern parlance he did not believe in "fooling with a buzz saw." He looked upon all temporizing as deception and dishonest, only delaying an inevitable result. He believed that the people were, as a rule, intelligent and were entitled to a full, fair, and impartial verdict in the construction of all laws, and if a plain and honest opinion was radical, it was right and just to be radical.

A legal controversy came up before the Court of Sacramento County, involving the obligations and responsibilities attached to railroad companies in rights of way for railroad beds. The Sacramento Valley Railroad, the first railroad constructed in the State, was built to Folsom, and passed through a farm belonging to a man named Moffatt. To protect his crops and stock, the track had to be fenced in, and the expense incurred in building the fence was a matter which the company proposed to test in the courts. The lower court gave the verdict to the railroad company and Moffatt appealed. Judge Terry wrote the opinion, in which he reversed the lower court, stating "that the cost of such fences must be included in the compensation to be paid by the railroad company."

In 1857 an act was passed by the Legislature, appropriating \$100,000 for the construction of a wagon road to the Sierra Nevada Mountains. The act also provided a Board of Commissioners, naming Surveyor General John A. Brewster and Secretary of State David F. Douglas, as said commissioners to locate

the road and carry out the provisions of the act. At that time the State debt exceeded the constitutional limit by \$100,000, and to test the constitutionality of the law, an action was brought against the State in the name of the people *vs.* Governor J. Neely Johnson by the Board of Commissioners, enjoining themselves from entering into said contract. A demurrer was submitted by defendants, which was overruled by the court below and the law declared unconstitutional. The case was taken up by stipulation to the Supreme Court, and the opinion was delivered by Chief Justice Murray, and concurred in by Justices Heydenfeldt and Terry. After citing the constitutional provision, the court says:—

“It is somewhat singular that this question, involving as it does such vital interests to the people of this State, has never been raised in this court before. It has been made the subject of legislative discussion and executive messages, but there seems to have been a general disposition on the part of all to give it the go-by, and the power of the Legislature to contract a debt of more than \$300,000, except in the manner provided in the Constitution, has never before, within our knowledge, been questioned in any court of justice. Whether considerations of public policy have actuated the other departments of the State government in avoiding a judicial exposition of this article of the Constitution, or private interests have excluded any question on the subject, we are, of course, unprepared to say; but, the question having been fairly made and presented for our determination, we are ready to pass upon it without hesitation.”

After referring to and quoting the language of the framers of the Constitution on the subject of State debt, the court says:—

“In the present case there are no considerations based upon settled rules presented to us. The whole argument rests upon what is supposed to be reasons of public policy, and the inconvenience which will result to a few scrip and bondholders who have come into possession of these evidences of indebtedness with a full knowledge of their worthlessness.”

In concluding, the judges say:—

“Before closing, it may not be improper to intimate our opinion with regard to the manner in which the present indebtedness of the State can be legalized, as we cannot entertain a doubt that the people of this State will act in good faith in this behalf, and that they are as zealous of her honor as they would be of their own. We have no fears that those who have adopted California as their future home, who have laid broad the foundations of an empire on the Pacific Coast, will ever permit her faith to be questioned, or her name to be branded with repudiation. We have an abiding faith in the integrity and justice of the people, and believe that, while they will readily assent to any measure to secure the payment of our present indebtedness, they will take heed how they incur such obligations in the future. . . .

“In announcing this opinion we are aware that we will meet with the opposition of those whom self-interest ever prejudices; but, if it shall have the effect of lopping off the unseemly excrescences which cluster so thick around the administration of the government,

or of correcting any of the evils which we have shadowed forth, we will rest contented, well satisfied that time and a sober judgment will, sooner or later, justify both the necessity and the correctness of this opinion."

It was understood at the time, and verified in after years, that this decision was written by Associate Justice Terry, and there is nothing about it that would suggest a contrary opinion, except its extreme length, which can only be accounted for in the fact that the question was one of vital importance to that class of people who made merchandise of State bonds and of the State's credit. In the article referred to, Mr. Waite presents an incident in connection with this decision which is worthy of a place in this book as showing the value which Judge Terry placed upon his honor and integrity:—

"The judge had been saving of his salary, and about \$2,000 in warrants on the treasury were in his hands at the time the decision had been agreed on, but not promulgated. He needed money, and there were present the influences of precedent and pressure. I have heard the tempter himself relate the circumstances. He approached Judge Terry when at work at his table, and said in substance: 'Judge, you cannot afford to lose this scrip you have on hand. You have a family to support. I have sold scrip for others to a certain firm here, and I will do the same for you.'

"My informant, who was in a position to know what the decision would be, said in an instant there was the form of an infuriated giant towering over him, and a stentorian voice in his ears: 'What! do you take me for a ——— thief? Do you think I would

cheat a Jew with what I have declared worthless? No, sir; I shall take my chances with the other creditors of the State for its redemption. Never come to me with such a proposition again, sir!

“With few affinities for the class to which Judge Terry belonged, I confess to have had a respect for him for his honesty to this day, from the impression this circumstance produced. The people—to their lasting credit—the next year adopted the debt by a direct vote.”

Mr. Waite, in making up his estimate of David S. Terry's character as a judge, gives voice to the idea that his “temperament and mind cannot be said to have been judicial.” While the writer does not wish to take issue with that gentleman, the verdict of history, as presented in the services of David S. Terry, from his earliest boyhood, points to the fact that he was especially adapted to the bench. His peculiar disposition, his natural infirmity of temper, and his exalted sense of dignity and honor which controlled his actions under all circumstances, endowed him with all the essential attributes of a judge. He would not imperil his reputation by any undue violence only in defense of these sacred virtues, and, possessing an imperious will and a fund of legal knowledge, coupled with natural good judgment, he could command himself in that exalted position.

CHAPTER XXII.

PRELIMINARIES TO THE GREAT POLITICAL CONTEST OF
1859—BRODERICK AND GWIN THE CHAMPIONS—
BOTH ELECTED SENATORS—BRODERICK WINS THE
LONG TERM—BAD FAITH ON THE PART OF GWIN
—BRODERICK AND PERLEY.

Referring again to the exciting and all-absorbing political contest between Broderick and Gwin, the two giants are both defeated in their aims. The opposition had secured the Legislature, and, as Gwin's seat in the Senate would be vacant the following March, it was the duty of the Legislature to elect his successor. As there were a large number of old-line Whigs, and men entertaining free-soil sentiments, in the composition of that body, Gwin, although a Know-Nothing by initiation, could not expect a majority to accept his extreme proslavery views, but he believed he had a sufficient number of friends among the members to prevent the election of a senator at that session. Broderick knew he had no following, and it was then that the two giants came together and put their labors in a balance to prevent any election at that term, being willing to take chances at the next election, although the State would suffer by the absence of one of its senators in Congress for two years. Broderick had a few able men in the Legislature. It was his aim always to provide a strong

support by having able men chosen to man his forces, and in this he was the better general of the two. The fragments that had come together under the Know-Nothing régime were unable to agree upon anyone, and the attempt to elect a senator was defeated, which was due to the arts of the Gwin-Broderick combination.

The presidential election, which occurred in 1856, resulted in the election of James Buchanan, although the new Republican party exhibited a strength and vitality which astonished the country. New York gave Fremont a large majority, but the cry of sectionalism prevented any defection from old party lines in the South and West.

The Kansas trouble had developed into a serious conflict between freedom and slavery, which was the result of the repeal of the Missouri Compromise, and Broderick, who had, as a State senator, opposed Stephen A. Douglas, and denounced him as a charlatan and demagogue in the introduction and advocacy of the Kansas-Nebraska bill, in 1854, became his friend and supporter when he took issue with the administration in opposition to the Lecompton Constitution, which was a scheme to introduce slavery into the territory, and which had been made an administration measure by President Buchanan in deference to the wishes of the South. It was while this exciting question was agitating the country that the election of 1857 took place, and the Know-Nothing party having subsided as an organization, and its members drifted into the organizations that had become inevitable under the pressure of the slavery

agitation, placed the Democratic party again in control of the State government. It was during the session of the Legislature of 1857-58 that Broderick exhibited his mastery in controlling political events. He had not a majority in the joint convention of the two Houses, but he never hesitated when a mere obstacle of two men stood in his way, and he set about to secure them, using any and every means necessary to accomplish the end, and he succeeded in his ambition. Having secured so much, his fertile brain suggested a change in the order of things as established by custom. There were two senators to elect, one for the short term to succeed Gwin, and one for the long term to succeed Weller, whose term would expire the following March. He called to his counsel his trusted friends, who could control the opposition to the extreme Southern sentiment, and, when the caucus met, the vote was taken to fill the long term first, and Broderick was chosen.

No sooner had he secured the coveted prize, for which he had struggled so many years and endured so much, than he began to exhibit his crafty and domineering spirit by demanding the right to name his colleague. He had a particular friend in Judge J. W. McCorkle, who had served a term in Congress, and he proposed at first to make him senator to succeed Gwin. Hearing of this, Gwin became alarmed, and immediately called a council of his trusted friends. It was suggested, and true as suggested, that all Broderick desired, to satisfy his ambition further, was power, and that must come through patronage. To succeed himself in the senate, Gwin must bargain

with Broderick, and a secret meeting was arranged between them, and Gwin entered into an agreement to surrender to Broderick the entire Federal patronage of the State with the single exception of one position, that of the custom house. The bargain was sealed, and the next day Gwin was elected senator.

Gwin was a long-headed politician. He was well aware of the disaffection between Douglas and the administration on the Lacompton question, and also that Broderick was pledged to the Douglas sentiment and following, and while he may not be known in the deal, he would continue to control the Federal patronage through Scott, who was an administration member of Congress. He knew Broderick's violent temper and impetuous nature, and that he would never yield one inch to President Buchanan. He was correct in his conclusions, for Broderick denounced Buchanan, and made the breach irreparable. The consequence was the Gwin-administration element retained the Federal positions, and to add to his mortification and weaken his hold upon the party in California, Weller was Governor, and he promptly set to work to pay off old scores by displacing every Broderick man in the State government. It was in this condition Broderick found himself placed in the second year of his senatorship, from which he had confidently expected so much to arm him with almost supreme command in party matters in his own State.

Senator Broderick and Congressman McKibben returned to California after the session of 1859, determined to rally their forces against the Lecompton administration faction, and Gwin and Scott returned

to oppose them. It promised to be the hottest campaign that ever California witnessed. Broderick was incensed at Gwin's perfidy and he made his enmity to him a personal matter. The conventions met—Lecompton and anti-Lecompton. The Lecompton convention nominated Milton S. Latham for Governor, and John T. Downey for Lieutenant Governor, John C. Burch and Charles L. Scott for Congress, W. W. Cope for the Supreme Bench, ignoring the claims of Judge Terry for policy's sake, fearing that his Know-Nothing record would endanger his election. Broderick determined to change the program. It was the intention of his followers to nominate General Redington, but he would not have it so. He demanded and enforced the nomination of John Curry, who had never been a Democrat and was now a Republican. He was a candidate for the Supreme Bench in 1857 against Stephen J. Field, by whom he was overwhelmingly defeated. John Conness was nominated for Lieutenant Governor, and Jo. McKibben and Samuel A. Booker for Congress. Royal T. Sprague was nominated for the Supreme Bench. Notwithstanding the bid of Broderick for Republican support, that party, then in its infancy, nominated Leland Stanford for Governor and Mr. Kennedy for Lieutenant Governor. They nominated Colonel E. D. Baker for Congress and indorsed Jo. McKibben. Their platform indorsed the course of Broderick and McKibben in Congress.

These nominations being made, the campaign was opened with all the vigor and violence that men know how to command. Before entering upon the canvass

an incident occurred at the International Hotel breakfast table one morning between Broderick and a man named D. W. Perley, who had been Judge Terry's law partner for several years. Perley had had a duel with a man named Henry Marshall in early days, and he was a hot-headed Southern man, smart, active, able, and not a very scrupulous attorney. The unpleasant incident was occasioned by a speech made by Terry after his defeat for the nomination for justice of the Supreme Court by the Lecompton convention. In connection with other candidates he was called upon to define his position, and in the course of his remarks he said:—

“Who have we opposed to us?—A party based on no principle, except the abusing of one section of the country and the aggrandizement of another; a party which has no existence in fifteen States of the Confederacy; a party whose principles never can prevail among free men, who love justice and are willing to do justice. What other?—A miserable remnant of a faction sailing under false colors, trying to obtain votes under false pretenses. They have no distinction they are entitled to; they are the followers of one man, the personal chattels of a single individual, whom they are ashamed of. They belong heart and soul, body and breeches, to David C. Broderick. They are yet ashamed to acknowledge their master, and are calling themselves, forsooth, Douglas Democrats, when it is known—well known to them as to us—that the gallant senator from Illinois, whose voice has always been heard in the advocacy of Democratic principles, who now is not disunited from the Democratic party,

has no affiliation with them, no feeling in common with them. Perhaps, Mr. President and gentlemen, I am mistaken in denying their right to claim Douglas as their leader. Perhaps they do sail under the flag of Douglas, but it is the banner of the black Douglass, whose name is Frederick, not Stephen."

This speech had been published in the *Sacramento Union*, which paper Broderick was reading at the hotel breakfast table. At the same table were seated A. A. Selover and wife, and Mrs. Colonel James. D. W. Perley sat opposite to Broderick and the other parties. In the course of the conversation, Broderick remarked to Perley:—

"I see your friend Terry has been abusing me at Sacramento." To this Perley responded, "What is it, Mr. Broderick?" Broderick's reply, as stated by Perley, was in these words: "The damned miserable wretch, after being kicked out of the convention, went down there and made a speech abusing me. I have defended him at times when all others deserted him. I paid and supported three newspapers to defend him during the Vigilance Committee days, and this is all the gratitude I get from the damned miserable wretch for the favors I have conferred on him. I have hitherto spoken of him as an honest man—as the only honest man on the bench of a miserable, corrupt Supreme Court—but now I find I was mistaken. I take it all back. He is just as bad as the others."

Perley asked, "Mr. Broderick, who is it you speak of as a 'wretch'?" Mr. Broderick replied, "Terry." Said Perley, "I will inform the judge of the language you have used concerning him." Broderick retorted,

“Do so; I wish you to do so; I am responsible for it.” At this Perley remarked, “You would not dare to use this language to him.” Broderick answered this by a sneer, and the repetition of Perley’s “would not dare,” to which Perley, then becoming incensed on his own account, thus responded: “No, sir; you would not dare to do it, and you know you would not dare to do it; and you shall not use it to me concerning him. I shall hold you personally responsible for the language of insult and menace you have used.”

Colonel Selover, when interrogated as to the language used by Mr. Broderick, stated that he had not used the profane expletive “damned,” as Perley had reported, but in other respects the statement of Perley was generally, if not entirely, accurate.

In this case Perley was as good as his word. He hastened to look up a friend to carry a message to Senator Broderick. Several declined the service, but finally he prevailed upon Mr. Samuel H. Brooks, the dear friend of Judge Terry, to bear the letter demanding apology or satisfaction, with the understanding that all subsequent proceedings were to be conducted, on the part of Mr. Perley, by his friend, Colonel E. J. C. Kewen, then temporarily absent from San Francisco. The letter was taken to Mr. Broderick, after a refusal on his part to receive a message of such character in the manner it came to him, and to it he returned this reply:—

SAN FRANCISCO, June 29, 1859.

D. W. PERLEY, ESQ.—*Sir*: Your challenge of the 27th inst. was handed to me last evening, by Mr. S. H. Brooks. This morning, between 7 and 8 o’clock, one of the servants at my hotel informed me that two gentlemen were below, who desired

to know if I had risen. I told the servant to say to them that I had. The servant returned with a note, purporting to be signed by Mr. Brooks, informing me that General E. J. C. Kewen had arrived, and desiring me to address any answer I designed to your challenge, to General Kewen, instead of to Mr. Brooks. This mode of procedure was so unprecedented that I had no recourse but to decline the recognition of any note coming, under the circumstances, by the hand of a servant. Subsequently, Mr. Brooks and General Kewen called on me in person. At this interview, the error committed in sending a note by a servant was corrected.

Two days have elapsed since the alleged insult was given. If I had been inclined to recognize your right to demand satisfaction, you have placed it out of my power to do so, by the publicity you have given the matter.

When affairs of this kind are to be arranged, it is customary to keep them a secret even from intimate friends. While I have refrained from making mention of the affair, I find it to be the subject of newspaper comment, and the theme of public conversation.

You knew, at the time you were searching for a gentleman to bear the challenge, that it would not be accepted. I informed you of the fact at the time the alleged insult was offered, in the presence of two gentlemen, and in language that could not be misinterpreted.

Your own sense of propriety should have taught you that the positions we relatively occupy are so different as to forbid my acceptance of your challenge. It is but a few days since you made oath that you were a subject of Great Britain. The giving or accepting a challenge could not, therefore, affect your political rights, as you are not a citizen of the United States.

For many years, and up to the time of my elevation to the position I now occupy, it was well known that I would not have avoided any issue of the character proposed.

If compelled to accept a challenge, it could only be with a gentleman holding a position equally elevated and responsible; and there are no circumstances which could induce me even to do this during the pendency of the present canvass.

When I authorized the announcement that I would address

the people of California during the campaign, it was suggested that efforts would be made to force me into difficulties, and I determined to take no notice of attacks from any source during the canvass.

If I were to accept your challenge, there are, probably, many other gentlemen who would seek similar opportunities for hostile meetings, for the purpose of accomplishing a political object, or to obtain public notoriety. I cannot afford at the present time to descend to a violation of the Constitution and the State laws to subserve either their or your purposes.

Your efforts to give publicity to the fact that it was your intention to send me a challenge, would justify me in giving a copy of this reply to the public. Circumstances will determine my course in this regard. Yours, etc.,

D. C. BRODERICK.

Judge Terry was of Southern nativity and rearing. His principles and sympathies in political matters were intensely Southern. He was not, however, nor had he ever been, a supporter or personal friend of Dr. Gwin. Between himself and Mr. Broderick, although the two differed so widely in political association and belief and sectional prejudices, there had, nevertheless, existed a fair if not warm degree of personal respect and mutual admiration. Broderick honored Terry for his incorruptible integrity as a public officer and citizen, and Terry admired Broderick for his determination and courage. Judge Terry was not involved in the campaign, as his judicial position forbade his appearance as a stump speaker; and he was not a candidate before the people, as Judge Cope had received the nomination over him. It was his first and last public commentary upon the political situation that year.

At that time Mr. Broderick was immersed in the

preparation for the hot canvass he had resolved to make. Naturally disposed to strong condemnation of whatever he disliked in public matters, and sensitive to anything which affected his own conduct or character, the remarks of Judge Terry, when reported to him, caused him much irritation.

Viewed in clear light, at this time, when prejudice and passion have passed out of the public mind, and the case can be reviewed in an impartial manner, it appears inconsistent with the sentiments expressed by Mr. Broderick, in his letter to Mr. Perley, that, recognizing the dueling code, and aware, as he intimates he was, that "efforts would be made to force" him "into difficulties" of the nature of that then before him, he should have rendered himself obnoxious to such efforts by the use of the harsh terms in which he spoke of Judge Terry at the International Hotel breakfast table, in conversation with Perley, whom he recognized as a friend of Terry. It was personal, offensively personal; and, as he betrayed before the heated colloquy ended, it was intended, manifestly, to be personal. The provocation he had, from Terry's remarks in the Leocompton Convention, was not of a character to justify personal replication. Terry's language was directed mainly against the party of which Mr. Broderick was the acknowledged leader, and, incidentally, his relation to that party was mentioned. But it was simply an exclusively political, public mention and characterization, clearly within the limits of ordinary and fair debate or allusion, and without the ingredient or tinge of personality. At the very worst, it in nowise reflected upon the character or upon the political stand-

ing of Mr. Broderick in point of integrity or honor. But Mr. Broderick's language concerning Judge Terry was very harsh, very offensive, in a personal sense; and, in respect to the exalted position he occupied, as chief justice of the Supreme Court of the State, it was intolerable to one who, in such position, was inspired with a just sense of the great dignity of the station itself, and a proper appreciation of the high duty he owed to his associates upon the bench, and the spirit which was due from him in upholding and vindicating the unsullied majesty of the law in its loftiest temple in the State. For it is not with the judiciary, as it is with the legislative or executive branches of the government. These are, from their nature and composition, political and partisan, favoring their friends, and, in greater or less degree, used against their enemies.

It is a common right, or, at least, a common privilege everywhere exercised, in monarchies and absolute governments, as well as in republics, therefore, to criticise and assail public men in political office, and to charge them with dishonesty, dereliction and corruption. But the judiciary is not political; it should never be partisan or partial in any respect; and to impugn the integrity of the judges, or to assail the court itself, is, in every civilized community, justly viewed as the most dangerous of the qualities of unbridled or licentious speech or utterance in any form. And the degree of harm and censure must be held in due proportion to the source of impugnement or attack. That which should come from the lips or pen of one low in the scale of community respect would pass only for its insignificant worth; but that which flows from men in

lofty station and of exalted character is likely to inflict injury beyond repair, and to blast reputation beyond redress. It was a senator of the United States; the foremost leader of a formidable element in the State; the acknowledged champion of the wing of the Democracy he led in that extraordinary contest; the bravest and boldest of them all, who had aspersed the character of the chief justice of the State, and by insinuation, if not directly, declared him to be "a miserable wretch," not an "honest man," but only one of "a miserable, corrupt Supreme Court," one "just as bad as the others" on that bench. And the eminent public man who thus stigmatized the Supreme Court, and who singled out the chief justice for his strong personal denunciation, had earned and long borne the distinguishing attribute to true greatness and worth; the glorious praise that his word was always sacred; that he never broke his faith; that all that came from his lips was stamped with the genuine seal of incontestable truth. It was in this light that the world must ever view the subject in conformity with reason and right. It was in such light that the object of Mr. Broderick's strong language viewed it; and thence proceeded the catastrophe to which we now come in the conclusion of this drama.

CHAPTER XXIII.

BRODERICK'S CHARGES—GWIN'S REJOINDERS—LATHAM'S DENIALS—THE SCARLET LETTER—DARK FOREBODINGS.

Broderick opened the campaign in Sacramento on the ninth day of August, before an immense audience which was presided over by General Redington. The capital city had never witnessed such an outpouring of the people. Broderick, while not an orator, and not happy in his address, was extremely forcible in the presentation of his subject. The people overlooked his lack of graces of rhetoric and applauded every stinging, pungent, caustic thrust and weighty stroke he gave his three conspicuous foes. It was the opening of the charge and countercharge of rankest political foulness, dishonor, and corruption. It compromised himself, but he cared not for this; it laid bare the conduct and rottenness and foulness of his contemned adversaries, and with this he was content. He opened his speech in the following language:—

“I come to-night to arraign before you two great criminals, Milton S. Latham and William M. Gwin. Latham has denied the charge made by me, on the authority of Tilford, that he had stolen, or caused to be stolen, the letter given by him (Latham) to Tilford, as a recommendation for collector of the port of San

Francisco, and a statement has been obtained from Tilford which, while he denies no facts stated by me, is designed to involve in obscurity and doubt the facts of the case. I have stated that Tilford came to me and said that a pledge had been given to him by Latham, that Latham, or someone deputed by him, had afterwards come to his (Tilford's) room and stolen the same. Tilford does not deny this, nor that he then therefore urged me to defeat Latham; but he says that he discovered his error in time, and came to me to tell me that the letter had been recovered, and that he had taken back the charge against Latham in consequence. It is true that he did come to me and tell me that the letter had been recovered and returned to him, but I never knew that he withdrew the charge against Latham until he gave the latter the whitewashing letter of February 29, which made its appearance in Nevada City."

To corroborate his statements in relation to Tilford and Latham, Mr. Broderick then read this letter:—

OROVILLE, August 5, 1859.

HON. DAVID C. BRODERICK—*Dear Sir:* I am in receipt of your note inquiring of me the facts, as I may recollect them, in regard to the election of United States senators in 1857. My recollection of the main features of the election is perfect and distinct. After your election, General Estill, Mr. Conness, and myself met in a room for the purpose of consultation. After thoroughly canvassing the sentiments and inclinations of the various members of the Legislature as to your colleague, I became satisfied that my own election was impossible.

The next question considered was whom we should support, and we came unanimously to the conclusion to support Mr. Latham. This fact was, as I was informed, communicated to Mr. Latham, and his election was considered certain by our

friends; and I have always thought that such would have been the result if Mr. Tilford had not interrupted the arrangements by charging, as he did, both privately and publicly, that a certain document given him by Latham had been spirited away. Mr. Tilford was very much excited about it, and indignant; and I understand from your language and manner that you were similarly affected. You stated that Mr. Tilford was and had been for a long time your devoted and effective friend, and that you would not support Latham; that you would support Gwin first. I refused to consent to the election of Dr. Gwin, and never did withdraw my opposition.

There are many other points connected with the election of United States senator; but what I have stated appear to me to be all that is necessary to notice as the question now stands.

Respectfully yours, etc., Jo. W. McCORKLE.

Mr. Broderick had stated in speeches elsewhere in the State that Mr. Latham and Dr. Gwin had each and alike separately agreed to surrender to himself the distribution of Federal patronage under the Buchanan administration, so far as either of them was concerned, in the event of an election, in case he should aid the one or the other in securing the senatorship for the short term. This statement Dr. Gwin and Mr. Latham had alike denied, and they cited to disprove it, similarly, this strong declaration from Mr. Broderick's letter of June 6, 1857, to General Redington and Mr. J. P. Dyer: "Between Mr. Gwin and myself there was no condition whatever in regard to the distribution of patronage. I learned, subsequently, however, that he had agreed with others to take no part in the recommendation of a single Federal officer." And again, from the same letter, this more comprehensive asseveration: "My own election was without bargain, contract, alliance, combination, or understanding with

anyone, over a combined opposition of which Dr. Gwin was the head and front. After my election he sought my aid to secure his own. I challenge my enemies to produce a man within the length and breadth of the State whom I ever deceived, or to whom I ever falsified my word."

These declarations, it was contended by Gwin and Latham, were traversed by the later statements of Mr. Broderick, both as concerned his own election and his participation in electing Dr. Gwin, and in respect to the arrangement in regard to the Federal patronage; also as to the alleged agreement to the same effect with Latham—for, if he had made such terms with Latham, it was himself who had practiced deception and failed to keep his word, inasmuch as he afterwards engaged with Gwin to elect him and thereby to defeat Latham. But Broderick had foreseen this line of denial, and to meet and overcome it he had taken the precaution to secure these letters to substantiate his own word whenever the occasion occurred:—

SAN FRANCISCO, January 20, 1857.

HON. D. C. BRODERICK—*Dear Sir:* In answer to your communication relative to what occurred between the Hon. M. S. Latham and yourself on the night of the 12th of January, 1857, and in connection with the senatorial contest, I have to say that I was requested by Mr. Latham to see you, and say that he authorized me to draw a written agreement, in which he would consent that the patronage of California should be exercised for yourself, so far as he was concerned, with the exception of a single promise he had made to Hon. C. L. Scott concerning the United States marshalship. He also said there were two other appointments he would like to see made, but they should both be subject to your approval.

I am, sir, very respectfully your obedient servant,

JAMES M. ESTILL.

SAN FRANCISCO, January 18, 1857.

HON. DAVID C. BRODERICK—*Dear Sir:* It was always understood that, in the event of Mr. Latham's election, you should have the control of the Federal patronage in California. Such, at least, was the belief of myself and others; and this belief was derived from the remarks of Mr. Latham on several occasions, and I am confident he will not deny the truth of the above statement. I saw no impropriety in such an agreement on his part, as your more enlarged experience in politics, and thorough acquaintance with the men of California, made you the more suitable adviser of the Federal government in this matter.

Very respectfully, FRANK TILFORD.

Mr. Broderick then explained why he had not supported Latham for election as senator, to this effect: "Latham had deceived and endeavored to betray me, and I had no one to select other than Latham or Gwin. McCorkle was my first choice, whom I preferred to any other in the State." But he went on to say he had entertained propositions from Latham, and he stated that Latham had finally come to see him, in disguise, and that he waited his opportunity to do so in concealment, in a water-closet, in order that the person then in conversation with himself (Broderick) in his room might not see and recognize him (Latham) on his awkward and humiliating errand. But Mr. Broderick was careful to avoid mention, and he felt sure that Mr. Latham would not then recall the fact, that, in arranging the plan of election, so as to bring off the election of the long term, for which only himself and Weller were candidates, he had sought and procured the assistance of Mr. Latham's friends, without whom the plan could not have been consummated, and his election would have been once more in doubt, inas-

much as it would have depended very much on the wish or intimation or dictation of the successful candidate for the short term, chosen in the regular order of things; and at that time Mr. Broderick lacked really two votes of a majority in caucus to nominate him. Dr. Gwin was practically bound, by the mutual agreement that had been made with Mr. Broderick, in April, 1856, to favor his election as his own colleague in preference to Weller; but, meanwhile, Gwin had discovered Broderick's real preference for McCorkle, and this might have inspired him to similarly break faith with Broderick.

Broderick prosecuted the canvass in the same fierce spirit he had manifested at Sacramento, in every portion of the State—at Yreka, at Shasta, at Quincy, in Plumas County, at Santa Rosa, and elsewhere. At the latter place he repeated the whole story of the bargaining of Latham and Gwin with him, and of the self-debasement of each to himself; and then, with prideful, gloating spirit and ineffable scorn, he declared, in his harsh, fierce, impulsive manner: “I had then my commission as United States senator in my pocket, when old Gwin came begging at my feet for favor and help. I remembered all that he had said and done against me, and before I would have refrained from my opportunity to humiliate him, I'd have torn my credentials into pieces, and thrown them in the fire!” Everywhere he proclaimed that “Gwin was dripping with corruption.” And as the cap sheaf, to heap coals of fire upon him and involve him—himself in great degree included—in inextricable toils, he read this from Dr. Gwin's own hand:—

SACRAMENTO CITY, January 11, 1857.

HON. D. C. BRODERICK—*Dear Sir:* I am likely to be the victim of the unparalleled treachery of those who have been placed in power by my aid and exertion. The most potential portion of the Federal patronage is in the hands of those who, by every principle that should govern men of honor, should be my supporters instead of enemies, and it is being used for my destruction. My participation in the distribution of this patronage has been the source of numberless slanders upon me, that have fostered a prejudice in the public mind against me, and have created enmities that have been destructive to my happiness and peace of mind for years. It has entailed untold evils upon me, and while in the Senate I will not recommend a single individual to appointment to office in the State. Provided I am elected, you shall have the exclusive control of this patronage, so far as I am concerned; and in its distribution I shall only ask that it may be used with magnanimity, and not for the advantage of those who have been our mutual enemies, and unwearied in their exertions to destroy us. This determination is unalterable; and in making this declaration I do not expect you to support me for that reason, or in any way to be governed by it; but as I have been betrayed by those who should have been my friends, I am in a measure powerless myself, and depend upon your magnanimity. Very respectfully, your obedient servant,

WM. M. GWIN.

This was the letter of self-debasement, of most pitiful humiliation, he had extorted from Dr. Gwin the night that the latter had gone to Broderick's room in the Magnolia House, attended by a single trusty friend, and no one else, save Broderick's close-mouthed manager, A. J. Butler, to see what was going on. The letter was intended for Broderick's sole knowledge, sight, and possession; but he had committed it, notwithstanding his pledge to the strictest privacy, to the custody of W. J. Ferguson, and from his possession, before his death, it had fallen into the hands of Gen-

eral Estill, and thence returned to the keeping of Mr. Broderick, for the public use he was making of it. At the time it was known as the "scarlet letter," so characterized from the "scarlet letter" worn upon the bosom of Hester Prynne, in Hawthorne's celebrated book with that title.

But Dr. Gwin did not allow these attacks by Broderick upon himself to pass unanswered, or without vigorous and scathing denial and denunciation. If he did not meet Broderick at any of his appointments, he visited nearly every place where Broderick had gone, and there and elsewhere he assailed and execrated him in the most violent language he could use. At Yreka he said:—

"Broderick's remarks about the senatorial election are a tissue of falsehoods from beginning to end. The main portion of his statement about Latham is false. Latham was a victim to Broderick's villainy in that contest. Under a garb of friendship, he concerted a conspiracy against me that is without a parallel in this or any other State. He deceived me, and then tried to ruin me, but I turned upon him and his minions, and I will pursue them as long as I live. I acknowledge with shame that for a time I was deceived by him, and I am willing to atone for it in sackcloth and ashes. . . . He intended to defeat my nomination, while professing to be my friend, to the very moment when it was made in caucus. He challenged me to this discussion. We will see if he will challenge me again to meet him, after what I have said to-night. He has returned home disgraced and dishonored, while I hold a position in the party that elected me of

which any man may be proud. He will slander and lie upon me. It is his avocation, but I will survive it now, as I have survived it heretofore. He acknowledges that he was in the market."

Dr. Gwin's assertion that Broderick had designed to defeat his nomination all the time he professed to be his friend, up to the moment the caucus chose him, was derived on Wednesday evening, January 13, 1857, the day following Gwin's election in joint convention, from Don Pablo de la Guerra, senator from Santa Barbara. He was a gentleman of unquestioned probity and honor, and had steadfastly supported Mr. Broderick since 1854, all the time opposing Gwin. In caucus he had voted for McCorkle, until, as he stated, Mr. Broderick had requested him, on Monday morning, January 12, to change his vote to Dr. Gwin. Don Pablo gave promise to do so, and he was not a man to break his word. But that evening, a short time before he went to the caucus, Mr. Broderick requested him to withhold his vote for Gwin. He told Mr. Broderick it was now too late, as his word was pledged to support Gwin. And he further stated, in relating the circumstance, that that same evening Mr. Broderick, at the urgent solicitation of Mr. Conness and others who favored Mr. Latham in preference to Gwin, endeavored to defeat the nomination which he had at an early hour that morning promised to the ex-senator. It was this timely information, before Gwin departed for Washington, in the winter of 1857, which caused him to act as he did when the new administration came in in March, with respect to the Federal appointments for California, and to doubt evermore the sincerity or fidelity of Mr. Broderick to his pledges.

Out of this exasperating war, and exchange of crimination and recrimination, which continued during the entire campaign, the most disagreeable and very hostile results were generally anticipated, of a personal as well as a political character. The settled conviction in the community in all parts of the State was, after the language which had been exchanged between Senators Broderick and Gwin upon the stump, that there would be—there could be—no alternative except a hostile meeting on what, in that code, is termed the “field of honor.” Such meeting never came. The fates had otherwise ordered. The Black Friday of Broderick’s election loomed into confirmation of the ancient malific superstition concerning that fateful day.

CHAPTER XXIV.

DUELING IN CALIFORNIA — BRODERICK'S IDEAS AND PRACTICE — HIS COURAGE AND DETERMINATION — THE CRISIS APPROACHING.

The public sentiment of California was averse to dueling; but, from the earliest period of the inrush consequent upon the gold discovery, that mode of satisfying or redressing personal affronts and grievances had prevailed; and the same community which, on other occasions, would denounce the code as "a relic of barbarism," was, singularly enough, the readiest to stigmatize as a coward, and socially or politically to ostracize, the public man who should decline to adopt this "barbarous" method of avenging his own honor, or of sustaining his own personal utterance against the one who should feel aggrieved thereat. Mr. Broderick was never a duelist by training or disposition. In his early rough life, as a tough fighter in the frequent conflicts of the New York volunteer firemen, he had followed the custom of his class, and depended upon his fists and physical strength and endurance; or, if weapons were resorted to, in desperate extremities, they were the tools and implements of the firemen, wrenches, spanners, trumpets, pipes, hose butts, etc.; but pistols and knives were never used. He was courageous, and naturally disposed to stand his ground,

or to meet force by force, no matter what the circumstances. He never adapted himself to the changes he found in other communities from the habits and customs in which he had been bred and become settled; but he nevertheless boldly faced and bravely accepted any alternative in preference to allowing impeachment or question of his personal courage and fearlessness. Hence, when he had resolved to enter upon public life in California, under the new and novel and unparalleled condition of society and community matters, he also determined to meet every emergency, and to face every peril, which the wild recklessness of the period and the exigency of the occasion required, in such manner as to gratify the most combatant of his friends, and to satisfy the demands of the most daring of his foes. He would, by this course, maintain his long-enjoyed reputation as a fearless and intrepid leader; ready to meet and surmount any difficulty or danger as a brave man should, among his friends and followers; and, moreover, he would command the respect and extort the admiration of his opponents and enemies.

Broderick found himself cast among a controlling element of different training and methods of life, in regard to community and public life. Affronts were answered or avenged by a resort to deadly weapons, either in street encounters or upon the dueling field; and to refuse, or to fly from this mortal arbitrament of the times, was equivalent to self-imposed exile, or certain to proscribe the "craven" from the society, and beneath the decent respect of this ruling element, which had always been accustomed to appeal to these

means of satisfaction or redress for personal wrongs and personal grievances.

It was not in his nature to evade or turn from whatever challenged his courage, or invited him to combat, in any form. And, as he was inexperienced and inexperienced in the use of weapons, he applied himself to the mastery of their use with the same determined assiduity and commanding spirit which ever characterized his more important actions and movements. His duel with Judge Smith could have been easily avoided without reflection upon his bravery or his honor; but he appeared to be inspired with the resolution that the "chivalry" element should be taught to know and to appreciate the fact that a "Northern man" could not be deterred from his purpose or overcome by mortal fear, even though life itself must pay the reckoning; and he went upon the field more to prove this than to attest his own fearlessness of death. He fought that duel, in fact, not so much to give satisfaction to his antagonist, as to vindicate the bravery of the Northern element he then represented, of which he aspired to be the most powerful and most honored representative. But in that duel he became duly cognizant of the necessity forced upon him of mastering the use of weapons to the utmost of his ability; and thereafter he applied himself to such purpose that he became really one of the best, if not unmatched, in pistol practice in the State. Yet, while he thus mastered the use of the deadly weapon, and although he was sensible of his peril in dueling and rose above it, he could never so control his nervous system as to fit himself in the very best and essential form for the ter-

rible ordeal of the field; and this lack of power was painfully visible to his friends, upon the occasion of his duel with Judge Smith. He could have impetuously led a multitude in the very jaws of death, without the relaxation of a fiber, with fiercer courage as the peril became imminent; but he could not command that prodigious and yet singularly delicate nervous force of his, which made his passion so grandly terrible, his nature so exceedingly sensitive, so as to be the creature of absolute composure, which the duelist must be, in his place of mortal peril.

The election occurred Wednesday, September 7. The Democrats carried the State. Broderick and the Republicans were badly defeated. The administration was strongest. From the nature of the campaign, and the extraordinary circumstances which had attended it, of terrible charge and countercharge, the character of crimination and recrimination, and the malignancy of the personalities, on the part of Senator Broderick and Gwin, coupled with the significant intimation of Mr. Broderick in his reply to Perley's hostile message, in June, that he should hold himself in readiness, after the campaign, to suitably respond to any call or demand that might then be made upon him, to answer for whatever he had uttered or might utter of a personal nature in regard to anyone—although he should decline to do so until that time—the public had been led to expect a hostile meeting between the two senators, and the most intimate friends of Mr. Broderick, those closest in his confidence and more given to open avowal of their views and sentiments, encouraged rather than deprecated

this common expectation, so far as their champion was himself concerned. It was notorious that Mr. Broderick had become, by assiduous and skillful training, one of the best pistol shots in the State; that he shot with surprising accuracy and with uncommon rapidity of glance; and that in the event of a duel, in which he should be the challenged party, with the prerogative to choose the weapons, there was not a man living who could excel, if any could equal, him in the quick and accurate discharge of a pistol. It was quite as notorious that Dr. Gwin was not a skillful pistol shot; that the rifle was his favorite weapon (it was with rifles that he and Judge McCorkle fought in 1853); and that he had neither the alacrity nor accuracy of Broderick. And as the duel, if duel there should eventuate, as everybody expected, should occur between the two fiercely hostile senators, there was a general acquiescence in the belief of Broderick's friends that he would not be the one, should harm befall, to leave the field the loser or victim.

CHAPTER XXV.

TRAGIC ENDING OF THE CAMPAIGN—CHIEF JUSTICE
TERRY'S DEMAND—BRODERICK'S REFUSAL. -MOR-
TAL COMBAT—BRODERICK FALLS.

An unexpected turn was suddenly given to this general expectation as to the individuality of the parties, or, at least as to the challenging party. Chief Justice Terry had felt himself deeply offended at the language which Senator Broderick had used in respect to his character as a citizen and his uprightness as a judge, in the conversation with Perley at the International Hotel breakfast table in June, and, at the moment he became aware of it from the newspaper reports, which published it to the world, he had resolved to ask explanation or demand apology or redress; but the subsequent declaration of Mr. Broderick, that he should not answer for any of his utterances then, or during the campaign, caused him to desist at the time, and to avail himself of the significance of Mr. Broderick's language, to the effect that after the election, he would not decline proper action in such matters. The election was now as good as over, and, accordingly, his time for the purpose he had resolved upon was immediately at hand. He left his residence in Sacramento, determined upon his unhappy mission, which he considered imperatively imposed, inasmuch as his assailant was a man of ex-

alted position, of national character, whose reputation for truthfulness, candor, boldness of speech, and undaunted courage, was of the highest order; and to refrain from calling him to account for the blasting nature of his language would be interpreted by the people, and accepted by the world, as self-admission of the worst charged against him; or, that which was equally unendurable to a brave and honorable man, possessed of manly spirit, as a public confession of that craven quality which impels its despicable possessor to submit to any wrong or insult or degradation sooner than to attempt vindication or demand redress, through abject fear of the consequences. Judge Terry was not of such debased stamp. Equally with Mr. Broderick, he preserved his honor as a man above all else, and was ever resolute in its vindication. He was not experienced in the use of pistols, as he was with the rifle, and had never witnessed but one duel, that in which he had acted as the second of D. W. Perley, in Stockton, in 1850.

While he felt that the language of Broderick was without sufficient provocation, and that Broderick was more in pursuit of Gwin, he was equally determined that it should not stand against him. In consulting with a few of his intimate friends, they all agreed that, as Broderick had been friendly toward him, and was of a generous disposition, rather than enter into a personal conflict, he would see the error into which he had fallen in a moment of petulancy, and would retract or modify his language in order to avoid a duel. Acting on this reasonable supposition, Judge Terry wrote out his resignation, without date, and handed it

to his friends, with instructions to withhold it until the negotiations determined the result. He then went to Oakland, and on the eighth day of September, 1859, addressed a letter to Broderick and sent it by the hand of his chosen friend, Calhoun Benham, as follows:—

OAKLAND, September 8, 1859.

HON. D. C. BRODERICK—*Sir*: Some two months since, at the public table of the International Hotel, in San Francisco, you saw fit to indulge in certain remarks concerning me, which were offensive in their nature. Before I had heard of the circumstance, your note of 20th of June, addressed to Mr. D. W. Perley, in which you declared that you would not respond to any call of a personal character during the political canvass just concluded, had been published.

I have, therefore, not been permitted to take any notice of those remarks until the expiration of the limit fixed by yourself. I now take the earliest opportunity to require of you a retraction of those remarks. This note will be handed to you by my friend, Calhoun Benham, Esq., who is acquainted with its contents, and will receive your reply.

D. S. TERRY.

Mr. Benham waited upon Mr. Broderick, delivered the above note, and had brief conversation with him in respect to it. Mr. Broderick remarked that he would give the matter attention the next day. Mr. Benham suggested the propriety or urgency of quicker action. And, after retiring from Mr. Broderick's presence, addressed to him this note:—

SAN FRANCISCO, September 8, 1859.

HON. D. C. BRODERICK—*Sir*: Should you have occasion to communicate with me sooner than the time agreed upon between us, I will be found at the Metropolitan Hotel. I omitted to leave my address this morning.

Very respectfully your obedient servant,

CALHOUN BENHAM.

Mr. Broderick's response to Judge Terry's note was in this form:—

SAN FRANCISCO, September 8, 1859.

HON. D. S. TERRY—*Sir*: Your note of September 8 reached me through the hands of Mr. Calhoun Benham. The remarks used by me in the conversation referred to may be a subject of future misrepresentation; and, for obvious reasons, I have to desire you to state what were the remarks that you designate in your note as offensive, and of which you require of me a retraction. I remain, etc.,

D. C. BRODERICK.

This note was a surprise to Judge Terry. The conversation with Perley at the International Hotel, in which Senator Broderick had uttered the offensive language concerning Judge Terry, had been published broadcast over the State, and Mr. Broderick himself could not be ignorant of it. He had impugned the honor and impeached the judicial integrity of Judge Terry; and the extraordinary utterance, from so high a source, had been made the subject of common talk everywhere. Judge Terry had expected a different answer. That which he sought was simply the retraction of the offensive language; a retraction such as honorable men feel bound to make for language used in an impulsive moment, under the influence of temporary passion, or when unduly aggravated to sudden angry outburst; a retraction which many brave and honorable men hasten themselves to offer, when sober reflection and cool judgment return, and their better nature prompts them to make proper amend for words that cannot be honorably justified or persisted in. And it is now known, upon the statement of some of Mr. Broderick's most intimate friends, who were then in confidential intercourse with him, called in to discuss

and give counsel upon the delicate matter at issue, that Mr. Broderick's own impulses and sentiments were in accord with theirs, in viewing the situation in this light. One or two of these true friends insisted that the requirement of Judge Terry was simply fair and proper—no more than Mr. Broderick himself would demand, were their positions changed. They protested against the draft of the note, as it was at last sent to Judge Terry; for they foresaw that it might shut the door to any accommodation of the difficulty, and lead to a hostile meeting, for which there was no just occasion; while the onus of such a meeting would rest upon the willful refusal of a proper and strictly honorable retraction, or disavowal of intention to offend, which must be interpreted as a determination to adhere to the offensive language and all that it implied or conveyed. At that precise point the difficulty ought to be adjusted, these ardent friends protested, as it was the precise point at which it could most readily, properly, and, with mutual assurances of former respect and good feeling to restore past friendly relations between the two, be brought to amicable adjustment.

Unfortunately, these wise and earnest counsels did not prevail. In the confidence of Mr. Broderick, at that time, and in constant intimate intercourse with him, were other men of less prudent and more aggressive nature. They were unquestionably devoted to him, and some of them were ready to peril even life in his cause, if need be; but they held human life, even his, at the reckless rate in which too many had valued it in early California days, when it was considered braver to persist in a wrong, to the extremity

of the "field of honor," than it was to show the higher courage and purer honor which requires just and honorable redress for injuries or affronts, which are sometimes more the result of circumstances and hasty action, or intemperate speech, than the disposition to harm, or the intention to offend. These imprudent and hot-tempered friends very well knew the great expertness and extraordinary accuracy of Mr. Broderick's pistol practice in the shooting galleries; and they were also aware of his fierce courage. They could not but have known, furthermore, of the irrepressible nervousness which the prodigious mental and physical strain of the campaign, superadded to the enormous drafts upon his system, which his amazing struggle for the senatorship had occasioned, that struggle which had continued incessantly through five or six weary and most anxious years, and which had visibly wrought its ill effects upon his once robust constitution—a nervousness in no respect the creature of fear, but the consequence, solely, of extorting from nature that much beyond her power to healthfully yield or healthfully withstand. They felt absolute confidence in his coming from any hostile encounter the victor, instead of the victim; and, besides this questionable assurance, they were in great degree actuated in forcing the issue—as they did finally force it—by the determination to prove to the "chivalry" that Broderick, as the acknowledged chief and boldest champion of the Northern element, was as ready to fight as the bravest of the Southern leaders. Allowing himself to be swayed by these rash and reckless advisers, Mr. Broderick at last concluded to reply to

Judge Terry's note as he did. It was followed by this:—

SAN FRANCISCO, September 9, 1859.

HON. D. C. BRODERICK—*Sir*: In reply to your note of this date, I have to say that the offensive remarks to which I alluded in my communication of yesterday are as follows: "I have heretofore considered and spoken of him [myself] as the only honest man on the Supreme Court bench; but I now take it all back"—thus, by implication, reflecting on my personal and official integrity. This is the substance of your remarks, as reported to me; the precise terms, however, in which such an implication was conveyed are not important to the question. You yourself can best remember the terms in which you spoke of me, on the occasion referred to. What I require is the retraction of any words which were used calculated to reflect on my character as an officer or a gentleman.

I remain your obedient servant, D. S. TERRY.

In this second note of Judge Terry's is apparent the disposition to refrain from pressing the difficulty to a hostile conclusion. He waived, or did not appear to heed, the patent fact that Mr. Broderick must himself have been perfectly aware, at the time he addressed his note of inquiry, as to the language deemed offensive by Judge Terry, just what that language was, and its nature and manifest meaning; and he thus presented still another opportunity to Mr. Broderick for the honorable retraction required, or such disavowal of any intention to offend or impugn the integrity of Judge Terry, as would have closed the correspondence, and led to mutual friendly explanation and renewed amicable relations. But this is the spirit in which it was received and answered:—

• FRIDAY EVENING, 9th September.

HON. D. S. TERRY—*Sir*: Yours of this date has been received. The remarks made by me were occasioned by certain offensive

allusions of yours concerning me, made in the convention at Sacramento, reported in the *Union* of June 25. Upon the topic alluded to in your note of this date, my language, so far as my recollection serves me, was as follows: "During Judge Terry's incarceration by the Vigilance Committee I paid \$200 a week to support a newspaper in his [your] defense. I have also stated heretofore that I considered him [Judge Terry] the only honest man on the Supreme Bench; but I take it all back." You are the best judge as to whether this language affords good ground of offense. I remain, etc., D. C. BRODERICK.

Upon the authority of gentlemen who were then the devoted friends of Mr. Broderick, and who still honor his memory, it is here stated that in the drafting of the above second note from him to Judge Terry, the same prudent and wise counsel was presented and urged by those who wished to prevent a hostile meeting. But again their good counsel was overborne by the persistence of the others, who argued that "the fight had got to come some time, and it might as well come now;" and these malignant advisers again and conclusively prevailed. The note left Judge Terry no other alternative except craven withdrawal from a demand which he was justified in, a relinquishment of his claim for apology or redress, or the course which he did pursue, to this purpose:—

SAN FRANCISCO, September 9, 1859.

HON. D. C. BRODERICK—*Sir*: Some months ago you used language concerning me, offensive in its nature. I waited the lapse of a period of time fixed by yourself before I asked reparation therefor at your hands. You replied, asking specifications of the language used which I regarded as offensive. In another letter I gave you the specification and reiterated my demand for a retraction. To this last letter you reply, acknowledging the use of the offensive language imputed to you, and not making the retraction required. This course on your part leaves me no

other alternative but to demand the satisfaction usual among gentlemen, which I accordingly do. Mr. Benham will make the necessary arrangements. Your obedient servant,

D. S. TERRY.

Senator Broderick had gone too far to recede with honor, or to save himself from the charge of cowardice, had he refused to comply with the inexorable conclusion; and even death to him was always preferable to the bare suspicion of a craven spirit. His pride was above his love of life in this respect. Accordingly, as the closing letter of the series, came this:—

SAN FRANCISCO, September 10, 1859.

HON. D. S. TERRY—*Sir*: Your note of the above date has been received at one o'clock A. M., September 10. In response to the same, I will refer you to my friend, Hon. J. C. McKibben, who will make the necessary arrangement demanded in your letter. I remain, etc.,

D. C. BRODERICK.

There was nothing now left but to prepare for the meeting, and to proceed with it. Colonel Thomas Hays, formerly of New York City, and one of Broderick's earliest supporters in San Francisco, was invited to assist with Calhoun Benham on behalf of Judge Terry; and ex-Sheriff David Colton, of Siskiyou, was similarly chosen on behalf of Mr. Broderick.

The four met for the purpose, and after due deliberation, Mr. Broderick being the challenged party, and therefore entitled to name the style of weapons and order the terms of combat, the following was presented by his seconds:—

“1st. Principals to be attended by two seconds and a surgeon each; also by a person to load the weapons. This article not to exclude the drivers of the vehicles.

If other parties obtrude, the time and place may be changed at the instance of either party.

"2d. Place of meeting, on the farm adjoining the Lake House ranch. The road to the farmhouse leaves the old Lake House road, where you strike the first fence of the Lake House property, about a mile before you reach the Lake House. There you take a road to the left, which brings you to the farmhouse, on the upper end of the lake (Laguna Merced), occupied by William Higgins. This is the general neighborhood; the precise spot to be determined when the parties meet.

"3d. Weapons, dueling pistols.

"4th. Distance, ten paces; parties facing each other; pistols to be held with the muzzles vertically downwards.

"5th. Word to be given as follows, to wit: the inquiry shall first be made, 'Gentlemen, are you ready?' Upon each party replying 'Ready,' the word 'Fire' shall be given, to be followed by the words 'one, two,' neither party to raise his pistol before the word 'Fire,' nor to discharge it after the word 'two.' The intervals between the words 'Fire, one, two,' to be exemplified by the party winning the word, as near as may be.

"6th. The weapons to be loaded on the ground in the presence of a second of each party.

"7th. Choice of position and the giving of the word to be determined by chance—throwing up a coin as usual.

"8th. Choice of the two weapons to be determined by chance, as in article 7th.

"9th. Choice of the respective weapons of parties to be determined on the ground, by throwing up a coin, as usual; that is to say, each party bringing their pistols, and the pair to be used to be determined by chance, as in article 7th.

"Time, Monday, 12th September, 1859, at 5½ o'clock, A. M."

The seconds of Judge Terry protested against the place selected for the meeting, and also against the unprecedented brevity of the firing time, as proposed by the seconds of Mr. Broderick, on which correspondence ensued, in this form and with this result:—

"On the part of Judge Terry, it is protested against the word being stopped short of the word 'three,' as unusual and unwarrantable; also against the place of meeting being either in San Francisco or San Mateo County.

"Mr. Broderick's seconds answer the protest in regard to the parties being restrained by the word 'two,' that it is neither unusual nor unwarrantable, and has the feature of humanity; also, that no possible advantage can accrue to their principal by fixing the place at a remote and isolated spot, where they will not be intruded upon.

"Article number 5, among the articles setting forth the terms upon which the parties are to have their meeting, is objected to, because the word 'three,' to follow 'two,' is not to be called as the word after which neither party is to fire upon his adversary; and it is propounded to the seconds of Mr. Broderick, on behalf of Judge Terry, whether or not such article (numbered 5) is insisted upon as a *sine qua non* to their meeting. A categorical answer in writing is requested.

"Article numbered 5, among the articles setting forth the terms upon which the parties are to have their meeting, being objected to, because the word 'three,' to follow 'two,' is not to be called as the word after which neither party is to fire upon his adversary, and it being propounded to the seconds of Mr. Broderick, on behalf of Judge Terry, whether or not said article (numbered 5) is insisted upon as a *sine qua non* to their meeting, and a categorical answer in writing being requested of Mr. Broderick, it is responded by his seconds that, having in the terms asked nothing but what their principal is entitled to, and the terms not subjecting their adversary to any disadvantage, the request is deemed improper, it being always reserved to them, the friends of Judge Terry, to accept or decline the proposed terms."

The arrangement to fire stopping at the word "two" was without precedent in modern dueling. The uniform rule had been to give the word, "Fire—one—two—three," and to discharge the weapons at any time between the words "one" and "three;" and this had been the invariable custom in California, in all affairs of the kind, according to the code. The change was a surprise to Judge Terry's friends and to himself. It was the opinion of his seconds that he was not obligated to submit to the extraordinary requirement; but he waived the disadvantage, as he felt that to insist upon the rule would subject him to the odium of having sought an apparent slight pretense to back out of an affair from which he expected the worst, through the superior skill of his antagonist. The seconds of Mr. Broderick were aware of his consum-

mate marksmanship in pistol practice, and he was accustomed to fire with uncommon readiness, at a moment's glance at the target. Hence they so arranged for the word, and mode of firing, and persisted in that arrangement. It was a material advantage, all other things being equal, especially in a case where the adversary was accustomed to ordinary deliberation in the discharge of his weapon. And so the terms stood as the seconds of Mr. Broderick had exacted.

In preparing for the affair, Judge Terry had procured, at Stockton, the dueling pistols owned by Jo Beard, ex-clerk of the Supreme Court, then in the possession of Dr. Dan Aylette. They had been purchased many years before, in Paris, by Beard's father, a distinguished citizen of New Orleans, and presented by him to his son, who brought them to California. They had been used several times in affairs of honor, and were so exactly alike in every respect that no difference had ever been discovered in their shooting qualities. They had hair triggers, evenly and equally adjusted. When Judge Terry received them from Dr. Aylette, he tried them with two shots. He made what are termed "line shots," but hit each time below the target. He tried them no more, but returned them to their case, and Dr. Aylette took them afterwards to Oakland. On Aylette's arrival there, the case of pistols was given in charge of Mr. John Freaner, formerly deputy sheriff under Jack Hays, and by him kept in safe custody until the moment the pistols were required, to be taken across to San Francisco for the duel. Judge Terry neither saw them, nor practiced with any other pistols, from the time he sur-

rendered the case back to Dr. Aylette at Stockton, until the weapon selected for his use by his seconds was placed in his hands, on the morning of the duel, when Mr. Broderick was also handed the weapon he was to use.

The time appointed for the duel and all the preliminaries were agreed upon during Saturday, September 10. The duel was fixed for Monday morning, the 12th. Notwithstanding the arrangements had been made to bring off the meeting, a number of the friends of Mr. Broderick, together with some of Judge Terry's friends, and others, who stood in mutually friendly relations to each of the two, undertook still to effect a peaceable settlement of the difficulty. Among these gentlemen, Edmund Randolph, A. P. Crittenden, and John A. Monroe bore leading part. John Nugent, the noted *Herald* editor, likewise exerted his influence. David Mahoney endeavored to prevent the meeting. But these efforts proved unavailing. To one of them, who had pressed his way to the place where Mr. Broderick was kept concealed to prevent arrest, and insisted upon an interview with him, Colonel A. J. Butler, who was doing duty at the door as sentinel and keeper, remarked, as he denied the admission so earnestly implored and insisted upon by the friend: "It is no use. You are too late. The fight has got to come, and this is the best time for it. Broderick never had a better chance, and he isn't going to get hurt. He can hit the size of a ten-cent piece at his distance every time. These 'chivs' have got to learn that there is one man they can't back down." It was in similar spirit that others, on the

same noble mission, were denied access to Mr. Broderick, and admonished to cease their endeavors. And it is hardly too much to say that, had these really true friends managed to get the ear of Mr. Broderick, the unfortunate meeting would not have taken place. It was on his own altar, mainly by his own high priests, that he was sacrificed. In fact, he felt himself that no sacrifice on his own part was likely; for he remarked to his intimate friend John White, before proceeding to the field on the first day, in response to White's remark that he hoped him safe deliverance, "Don't you fear, John; I can shoot twice to Terry's once; beat him shooting every time." It was this supreme confidence in his own expertness with pistols which inspired him from first to last.

Dr. Dan Aylette was engaged to attend Judge Terry upon the field, as surgeon, and he invited Dr. William Hammond to accompany him. Dr. Hammond had never, up to that time, seen either of the principals. They were alike entire strangers to him; and, as he had never engaged in political life or participated in party matters, he had no bias or feeling, one way or the other. He was expected simply and solely to officiate as surgeon in case his services should be required. Dr. Loehr, editor of the German anti-Lecompton paper in San Francisco, was engaged as surgeon for Mr. Broderick.

The day and night before the meeting on Monday morning, Judge Terry was housed at the residence of Colonel Thomas Hays. Mr. Broderick was amply cared for at the house of a devoted friend near the place of meeting. At the appointed hour, the parties

were on the ground; but just as the seconds were about to proceed with the affair, Chief of Police Burke, fortified also with the legal papers from the authorities of San Mateo, in which county the field was situated, just across the San Francisco line, advanced from a corner of the field and arrested the principals, serving each with a writ to answer in court that day. The parties submitted to the authority of the law, and that day appeared before Judge Coon, who had been chosen to the place upon the People's ticket, nominated by the Vigilance Committee element. Colonel E. D. Baker appeared on behalf of Mr. Broderick, and the prosecuting attorney insisted that the parties should give bonds to refrain from further attempt to violate the law or break the peace. Judge Broanan appeared upon the opposing side. Judge Coon decided that no breach of the peace had been committed, and discharged the defendants. Dr. Aylette, satisfied in his own mind that the affair was stopped for the present, returned that afternoon, by the Stockton boat, to his home.

That night, however, as the parties were free to go on and conclude the matter, it was arranged that the meeting should come off the next morning, at the same place and hour. Dr. Hammond was then engaged to attend on the field, as surgeon for Judge Terry. At the appointed hour the parties again reached the ground. The spectators numbered about eighty, having made their way thither in all manner of vehicles, on horseback and afoot. In choosing for the customary points of advantage, agreeably to the articles, by the tossing up of a half-dollar, the seconds

of Judge Terry won for him the choice of weapons; and Mr. Broderick's seconds won the choice of ground and the giving of the word—a decided advantage, inasmuch as that had been the disputed point, the manner of giving the word as insisted upon by Mr. Broderick's seconds. By mutual agreement, "Natchez," the noted gunsmith of the city, was employed as armorer. The seconds of Mr. Broderick had brought the pair of pistols he preferred, just as Terry's seconds had with them the Jo Beard pistols of his choice—the pair they then selected for the duel.

The two principals first took station on the field at random, each with his friends near about him. They showed equal nerve, but Judge Terry was apparently more composed. He closely eyed his antagonist. Mr. Broderick once directed his glance toward Terry, looked at him squarely, and then averted his eyes, as if not caring to continue it. A singular difference of conduct was noted in the surgeons. Dr. Hammond had come upon the field, addressed and shaken hands with Judge Terry, and then thrown himself upon the ground, with his overcoat underneath him. There was nothing visible about him to indicate his profession, in the way of instruments. Dr. Loehr, on the contrary, had brought with him a large sack, containing surgical instruments and a lot of bandaging stuff, and from the mouth of this sack protruded a long saw—the whole paraphernalia suggestive of desperate operations in surgery. He sought occasion to converse with Mr. Broderick, while the latter walked to and fro awaiting the call of his seconds, and all the time he carried, or partly dragged, this horrid-looking

sack, with its rattle of instruments, its ugly protruding saw, and its plethora of linen rags for bandages. It demonstrated the remarkable self-possession of Mr. Broderick, that he paced the ground with his surgeon during their conversation with such splendid equanimity of manner. It was a raw morning, and the two chief actors in the tragic scene kept on their overcoats while they could. It was noticeable that Mr. Broderick had drawn his soft felt hat down low over his eyes, and that occasionally he pulled the rim still lower, while Judge Terry adopted the opposite mode of wearing his hat, of similar kind, far off his forehead, and back upon his head. Still, Mr. Broderick seemed as one confident of his own ability to bravely sustain himself in every respect, and determined upon no child's play. Conscious of his wonderful skill in the weapons his seconds had stipulated for the encounter, he evidently felt certain of hitting his mark, for his opponent was even of larger frame than himself. Of this skill, the *Morning Call* of that very morning had published this report, and it had been shown to his antagonist:—

A DEAD SHOT.

It is generally understood that Judge Terry is a first-rate shot; but it is doubtful whether he is as unerring with the pistol as Senator Broderick. This gentleman, recently, in practicing in a gallery, fired two hundred shots at the usual distance, and plumped the mark every time. As he is also a man of firmer nerve than his opponent, we may look this morning for unpleasant news from the field.

This was manifestly the general opinion and expectation of Mr. Broderick's friends and admirers; for

they had knowledge of his skill in shooting, and they all knew his indomitable pluck. Judge Terry had himself been apprised of Broderick's skill, and he was duly conscious of his own disadvantage in that respect, especially as the rapid form of aiming and firing enforced by Mr. Broderick's seconds added to his risk. But he seemed steeled for the terrible ordeal, and gave no sign of nervousness while the preliminaries were in progress.

At length the seconds invited the principals to their allotted stations. As Mr. Broderick's seconds had won the choice of ground, they secured for him the due advantage. The sun was just rising above the neighboring low hills. Mr. Broderick was placed with his back to the sun, Judge Terry facing it. The pistols were carefully examined by the seconds, then loaded—Mr. Broderick's by the armorer, and Judge Terry's by his friend Sam. H. Brooks—and handed to the principals. Before taking their positions, Terry had watched Broderick carefully, and he remarked to Colonel Brooks that he, Broderick, was in no condition to fight a duel and he did not propose to more than "lame him." Brooks saw that Terry was right. Broderick appeared like a man in a trance. The fact was, he did not want to fight Terry, but he did want to fight Gwin, and he expected to. But Brooks, in handing the pistol to Terry, said: "This is no child's play, Mr. Terry; you have come here to put yourself up to be shot at. If you mean anything, it is to kill, and you owe it to your wife and family and to your friends to protect yourself. You see those men up there (pointing to some eighty or a hundred who had gathered in

the rear of Broderick). Every man there is a friend to Broderick, and they are here to see you killed and to rejoice over it. You say you only intend to lame him. I want you to promise me that you will not trifle with your opportunity."

Terry cast his eyes over the field, saw the throng that had congregated, and said to Brooks: "I will hit him, but I do not want to kill him." With this remark, Colonel Brooks retired, feeling confident that Terry would end the controversy by inflicting a wound that would put Broderick in such a condition that there would be no occasion to repeat the shot.

Judge Terry took his pistol, held it behind him for a moment, and then rested it on his left arm in front. Mr. Broderick critically examined his pistol, and took pains deliberately to adjust it to his grip. Apparently satisfied, at length he attentively measured with keen look the ground between his adversary and himself, both ways, to and from him. The two had cast off their overcoats, and were quite similarly dressed, in full black suits, with frock coats buttoned across the breast, and without shirt collars. Mr. Benham examined Mr. Broderick's person to see that he wore nothing to stop or glance a bullet; Colonel McKibben similarly examined Judge Terry. Mr. Broderick had just before handed his watch and the money in his pockets to McKibben, and Judge Terry had likewise passed the contents of his pockets to Benham. The word, as it was to be given, was exemplified by Mr. Colton, and repeated by Mr. Benham. The seconds then took their appropriate places. Judge Terry stood erect and firm, but in easy attitude, with his

body accurately sideways to his antagonist, his pistol arm hanging naturally, close to his person, with apparent readiness for full play to every muscle, his pistol in exact vertical position, and his legs precisely in line. His look was directed full toward Mr. Broderick, and his facial expression was of imperturbable composure, alive to the serious matter in hand.

Mr. Broderick's whole frame revealed the tremendous power of his determination, and his face, pallid from the wasted condition of his system, incident to the exhaustion of the fatiguing and terrific campaign he had so recently concluded, showing the prodigious force of his will in the mastery of his shattered nerves, now held as in wonderful strain of rigidity. There was not the tremor of a fiber from crown to sole. But his rigor of body was so severe that he had not easy command of motion, or essential play of action of trunk or limb. He stood as a marvelous complication of mortal clay and nerve so delicately and yet so stoutly fashioned that, while no deadly peril could affect it, no external force could shock it, the slightest internal disturbance would disconcert it all. It was observed by the seconds of Judge Terry that Mr. Broderick held his pistol, not vertically, as the articles required, but pointed outward in obtuse angle, and to this defect Mr. Benham called the attention of Colonel McKibben, who immediately went to Mr. Broderick's side to rectify the wrong. His rigor of frame was so intense that, in the effort to adjust his pistol to the required position, he was obliged to use his left hand to bring his right arm into proper form; and in the effort he also so swerved his whole body that his

right leg was pressed out of place, downward and forward, out of line with the left leg, and his chest was thrown out and quartering toward his antagonist, so as to present a larger surface for the chance of a shot aimed at him. He held his pistol in vise-like grip; and his wrist, instead of being in condition for ease of motion, was as an iron bolt, to move only with and as rigidly as the arm. He seemed the impersonation of that order of courage which faces death without terror, which prefers doom to the reproach of fear. Like Wellington's intrepid soldier, he was conscious of his peril, but braved it.

At nearly 7 o'clock that fated Tuesday morning, every other procedure of the awful scene having been adequately performed according to the articles, Mr. David Colton, the second of Mr. Broderick, upon whom the painful duty had been imposed, put the dread question, preliminary to the "word," "Gentlemen, are you ready?" Instantly the response came from Judge Terry, "Ready," in firm, natural tone of voice, and without play of feature or movement of muscle. Mr. Broderick did not respond at once, but again occupied a few moments in adjusting his pistol. This done, evidently to his satisfaction, he spoke the word "ready," accompanied by a gesture and a nod, as of assent to Mr. Colton. Then came the "word," "Fire—one—two." The pause between the words was as that between the striking of the hours of "the cathedral clock," as a critical observer described it. Almost at the "one," Mr. Broderick fired. The ball from his pistol entered the ground just nine feet from where he stood, in a true line with his antagonist.

WILLIAM C. BRODERICK, NEAR LAKE MERCED, SAN MATEO COUNTY, SEPT. 13, 1859.
BRODERICK MORTALLY WOUNDED.





Judge Terry fired before "two" had been uttered. A slight show of dust upon the right lapel of Mr. Broderick's buttoned coat gave token where the ball had struck. In a moment Mr. Broderick's right arm was raised nearly in line from his shoulder and extended at full length; the left arm simultaneously moved in similar manner. In his right hand he still gripped his pistol. A visible shuddering of the body was instantly perceptible, then a violent contraction of the right arm, a relaxation of the fingers of the right hand, from which the pistol dropped to the ground. A heavy convulsion shook his quivering form, he turned toward the left, his head dropped, his body sunk, his left knee first gave away, then the right, and in a moment he was half prostrate on the sod, his left arm supporting him from falling prone. His seconds rushed to his aid. His surgeon was with him in a flash, but it was soon manifest that he had been somewhat confused by the scene. Judge Terry stood with folded arms in his appointed place, awaiting the requirements of the situation. His seconds went to him at once, and he remarked to Mr. Benham that his ball had "hit too far out" to be mortal; he believed it to be no more than a flesh wound, over the chest, and not dangerous, for no blood had flowed from Mr. Broderick's mouth, as is the case in instances where the lungs are penetrated. Satisfied, however, that another shot would not be required by Mr. Broderick's seconds, Terry then left the ground.

From his place on the sward, Dr. Hammond had sharply observed all that had occurred. He did not think that Mr. Broderick was dangerously wounded,

felt confident that the hurt was not mortal, but he saw the perturbation of Dr. Loehr, and at once suggested to Mr. Benham the propriety of the proffer of his own services to Mr. Broderick. At that instant, as Mr. Benham was advancing to make the proffer, Colonel McKibben came forward to request Dr. Hammond's assistance, and stated that it was also the desire of Dr. Loehr. Dr. Hammond immediately went to Mr. Broderick's side, and assisted in the examination. Mr. Broderick conversed with him about the nature of the wound, in a calm manner, and without apparent dread of the consequences. As Dr. Loehr had omitted to bring restoratives or bandages suitable for the purpose, Dr. Hammond furnished Mr. Broderick with his flask of brandy, and put about him the chest bandage necessary in a wound of the kind. And then, after courteous exchanges on each side, between Mr. Broderick and himself, the seconds and the surgeon, Dr. Hammond withdrew, more assured than ever that the wound was not likely to prove mortal, as less than a tablespoonful of blood had been expectorated, and there was no indication of internal hemorrhage—good or hopeful tokens that the lungs had received no serious injury.

Mr. Broderick was soon conveyed to the house of his friend, Leonidas Haskell, at Black Point. Judge Terry rode into San Francisco, took a boat, held ready for him by Michael Hays, brother of Colonel Thomas Hays, and was taken directly to Oakland, where he was met by John Freamer, who informed him that the report in town was that Broderick had been killed. Terry assured him it was not the fact;

that his ball had struck him "too far out," as he had first expressed it on the field. He also said to Mr. Freamer that, had a moment's further deliberation been allowed him in the firing, he should have shot so as to inflict no injury whatever; but the information he had received of Broderick's amazing skill in shooting, supported by the paragraph statement in the *Call* that morning (copied in this chapter), and the apparent determination of Mr. Broderick himself, on the field, impelled him, in consideration for his own life, to shoot so as to prevent the risk of a second shot from his antagonist. From Oakland he proceeded homeward, and subsequently surrendered himself to the authorities, to answer for the deed, thence to pass acquitted of criminal intention in what he had done, but to suffer for it through many years, in the ways hardest for a man of high spirit to suffer and endure.

CHAPTER. XXVI.

BRODERICK'S DEATH—THE INQUEST—THE OBSEQUIES —PUBLIC SENTIMENT.

Senator Broderick received his wound Tuesday morning, September 13, at about seven o'clock. It was not considered mortal at the time. Subsequent examination by the surgeons developed its dangerous nature. He had complained of a pain in his left lung to Dr. Hammond, on the tragic field; but that gentleman and Dr. Loehr alike believed it not serious. All the indications were to the contrary. Closer examination, under circumstances better adapted to the occasion, demonstrated the error of this belief. Still, during Wednesday and Thursday there were hopes of his recovery. These were dissipated Thursday night; and at 9:20 o'clock the morning of Friday, the 16th of the same month, he died. Fated and fatal Friday to him. It was on a Friday, also, something more than two years before, he had been chosen a senator of the United States, the pinnacle of his life's ambition, the consummation of his many years of struggle and study and toil, such as no other mortal ever endured or ever triumphed over. Now he lay dead, in his fortieth year, in the full vigor of life's prime, in the height of his own marked career, and upon the very verge of the yet higher and yet grander

field he was so likely to be called, in making his name still more famous, and building for himself a monument more enduring than stone, prouder than his own prideful and aspiring spirit had in earlier years ever dared to soar in its ambitious flights, limitless in its world-wide scope.

On the afternoon of the following day the coroner held inquest upon the body. Doctors Holman and Bertody were appointed to the duty of the autopsy. It is enough to state that the ball had pierced the lungs, and no mortal power could have saved the patient from death. It had been reported that there was a perceptible difference in the hair triggers of the pistols, and that the one left for Mr. Broderick to use was much more delicate to the touch than the pistol used by Judge Terry; and this was made a subject of special inquiry. Lagoarde—"Natchez"—the armorer, stated it to be the fact, in his examination. Colonel McKibben, who had so critically examined the pistols on the field, and even tried the one used by Mr. Broderick, testified positively that there was no appreciable difference in the two; that the weapons were, in every respect, similar. It was the disposition of "Natchez" to find fault with any other pistols than his own. And after the inquest, there was published, in connection with it, this, which appeared in the *San Francisco News*, Mr. Broderick's campaign organ:—

"We are requested by Mr. McKibben and General Colton (the seconds of Mr. Broderick) to state that Mr. Lagoarde, the gunsmith, did not tell them when on the ground, as he testified at the inquest, that there was any difference between the pistols used by Mr.

Broderick and Judge Terry; and, that so far as their own careful examination of the weapons was concerned, there was no perceptible difference in the tightness of the triggers."

The verdict of the coroner's jury was in accordance with the evidence and the facts.

The obsequies were solemnized on Sunday, September 18, in a manner never before witnessed on any similar occasion. Before his death, Mr. Broderick had received the sacraments of the dying in the Roman Catholic Church, although he had not, during his life, been a communicant of that church, and the funeral was arranged from the Union Hotel, so long Mr. Broderick's headquarters. A platform had been erected in the plaza opposite, and there Colonel E. D. Baker delivered an eloquent oration, befitting the sad occasion. Among the pallbearers were Judge McCorkle, Judge Ogden Hoffman, General Vallejo, ex-Governor McDougal, Judge Currey, Jo. C. Palmer, D. J. Oliver, Ben S. Lippincott, John A. Monroe, Judge Shaw, Alex. Campbell, Frank Soule, E. L. Beard, John O'Meara, Edmund Randolph, Wilson Flint, S. M. Dwinelle, John White, and his former fellow-firemen of New York, George Green, F. D. Kohler and Wm. McKibben. John Middleton was grand marshal of the procession. The Rev. Fathers Hugh Gallagher and Maraschi were the officiating clergymen at the ceremonies. A hundred and fifty, comprising many of the most distinguished citizens, served as chief mourners, conspicuous among whom were A. P. Crittenden, John Conness, Colonel Jo. C. McKibben, General Colton, Colonel A. J. Butler, C.

Stagg, Elliot J. Moore, John McGlynn, Lucien Herman, L. Shearer, P. Crowley, Judge Crane, G. W. Colby, Marcus Boruck, Wm. M. Lent, Wm. F. Williamson, Thos. Maguire, Harry H. Byrne and Charles Cook. Under the marshalship of David Scannell, the whole fire department marched. The Society of California Pioneers attended in strong force. Other societies, citizens on foot, and more in a long line of carriages and every kind of vehicle, participated. The remains were entombed in Lone Mountain Cemetery. The day after the funeral the *News* closed an editorial on the subject with this remark:—

“It is said that Napoleon should have died at Waterloo. Mr. Broderick died not on an inappropriate field. ‘The blood of the martyrs is the seed of the church;’ and we mistake greatly if the sacrifice of Mr. Broderick’s life will not be fruitful of revolutionary results in the popular mind.”

The sentiment and prediction were not wasted on barren soil. The mourned dead was utilized to subserve the purposes of the living, who had professed most to honor and to admire him in the life. By thousands his death was sincerely and passionately mourned. The whole community lamented it. The State and local authorities, the courts, the various societies and organizations, expressed their grief in resolutions of sorrow, and in tributes to his memory proclaimed their admiration for his character. The Republicans, in public meeting, and the party he had so lately led with unmatched vigor, alike deplored his death; but, in alluding to the manner of it, his own organ, the *News*, editorially made this remarkable statement:—

"The day after the election he [Broderick] waited in hourly expectation of receiving a series of challenges to mortal combat from his leading political opponents, and the first which reached him was from Judge Terry. This he did not regret, since, as he was told, D. S. Terry enjoyed the reputation of being the most expert shot in the State, was the representative of the most desperate 'Chivalry,' and was, perhaps, his most extreme political opponent in the State."

After the funeral came a hot cry for vengeance, and vehement appeals and demands upon the authorities, with efforts to rouse popular indignation. Chief Justice Terry had resigned his high station before he engaged in the duel; and now there were clamors for his blood in atonement for Broderick's death. The *Call*, which had, the morning of the duel, composedly intimated that Terry would come off worsted, the next day proclaimed, in flaming headline, that there was "Another Victim to the Bloody Code!" The *Times*, edited by Charles A. Washburn, who had received a flesh wound in his duel with Frank Washington, became furious for the "extremity of the law" to be executed upon Terry. The *News*, with John White as editor, frantically labored to arouse the worst passions of the multitude; and other papers in the cities and throughout the interior counties were as desperately bent to provoke trouble, if not bloodshed. On his departure from San Francisco, accompanied by Congressman Scott, then re-elected, Dr. Gwin had flouted in his face a large canvas frame, on which was painted a portrait of Mr. Broderick, and this: "It is the will

of the people that the murderers of Broderick do not return again to California;" and below were also these words, attributed to Mr. Broderick: "They have killed me because I was opposed to the extension of slavery, and a corrupt administration." And at the head of the columns of the anti-Lecompton organs was printed these reported solemn injunctions of Broderick to his friends: "If I die, protect my honor." "I die for a principle."

Against this overwhelming flood of passion and fury, the administration papers opposed their best efforts, with comparatively small avail. Anger and vindictiveness ruled, and reason was feeble to withstand the onset. The *National*, edited by Frank Washington and George Pen. Johnson, and the *Standard*, controlled by Judge Charles T. Botts, were the leading organs of the administration, and all that it lay within them to do was done, but the tide or the torrent was plainly setting or forming the other way. The victory in the late campaign had been theirs by great odds; they had triumphed over Broderick's forces and the Republicans combined, after the most exciting and most acrimonious campaign ever waged in California. And yet, already, in a short week or so, with Broderick dead in his grave, there were deep-down indications that the cause for which he had so desperately battled, in which he had been so mortifyingly defeated, would in the very next year win a victory unparalleled in American politics. While he lived, his own cause, often in the minority, had rarely ever accomplished more than a partial triumph. He alone had succeeded as he wished; and it was by his

own irrepressible energy and indomitable presequence that he had succeeded. He could not lift his party to his own height, nor lead it whither he could force his own way. But now, no longer numbered among the living, resting forever with the unnumbered dead, his blood became indeed the seed of his worldly church; there was in it, conjoined and merged with that of others in a few months to flow, the vitalizing seed, and the quick, resistless power to divide and demoralize the party of his earlier days, to suddenly rear up another which should radically overturn and scatter it in confusion and rout, and then to excite disastrous internecine war.

Thus the living, active Broderick failed and fell at last, only as, his friends felt, to take from death its sting, from the grave its victory, and in the spirit, which he yielded not as he fell, to stalk, as the man himself would have eagerly given all but life itself could he have so stalked for bare one hour.

It was in the manner we have described in these pages that Broderick lived; and the manner of his death is told. He was the last of his family line; he had been from his early manhood the sole survivor of his family and kindred, and now there was left only his name and the fame he had acquired to perpetuate. He had been the architect of his own fortunes, the sole genius of his own wondrous fabric of the lifetime he had made so dazzling and yet so calamitous. He had risen by his own exertions; he had schooled and trained and educated himself to be superior to every emergency, and the peer of the most powerful in the land, and it was by his own prodigious force of char-

acter that he had lifted himself out of the lowly sphere and obscurity to which he had been born and bred, and pushed and climbed his way to the exalted station from which his untimely death had so unexpectedly plucked him. He had encountered and overborne the mightiest in his adopted State; the Great Conqueror had proved his only conqueror. Undismayed, persistent, resolute, he had stubbornly adhered to the pursuit of his life's ambition until he had attained it, and not until he had then humbled the most formidable and most rancorous of his opponents, by "pulling out his claws and putting his brand upon him," were his pride and his vengeance alike satisfied. Nor even with this great triumph of his life, so his most intimate friends had reason to believe, was his towering ambition satisfied, for it was insatiable while there remained a loftier height to climb, a grander destiny beyond. It was inappropriate, they thought, and still think, to contrast him with Napoleon, and his fate with Waterloo. More appropriate, they urged, would have been the comparison with Wolfe, who fell at the moment of his greatest victory upon the heights his valorous foe had counted inaccessible. Yet Broderick did not so fall, however much his admirers may have believed, or do still believe, that, had he survived, his most glorious victory was yet to come, to place him upon the very pinnacle of his country's loftiest height, in position which he would have made one of almost supreme control. He had lived his destiny.

CHAPTER XXVII.

JUDGE TERRY SURRENDERS TO THE AUTHORITIES— GIVES BONDS—HIS TRIAL AND ACQUITTAL BY A MARIN COUNTY JURY.

After Judge Terry had arrived in Stockton, he found the sentiment of the people so one-sided and against him that he concluded to surrender himself to the proper officers and demand a trial. He was not willing to be called the murderer that seemed to pervade the public mind, knowing that he had only resented an assault more damaging to a man of his mental and moral standard of manhood than a blow in the face, or any other infliction of force on his physical body. The sharp criticism and apparent prophecy of the *San Francisco News*, which was Broderick's organ, that "the sacrifice of Broderick's life would be fruitful of revolutionary results in the popular mind," had a semblance of truth, but the results which followed were brought about by events of a more general character. The nation was in political convulsions, and the tide of events toward the dreadful solution of the slavery question, in a fraternal and sectional conflict, was flowing with irresistible fury, finding a response on the Pacific Coast, to which the death of Broderick, although in sympathy with the masses, added but a feeble spark. Of it, however,

his friends and sympathizers made him the hero and the martyr, and Broderick dead—killed by the hand of a man of strong Southern proslavery proclivities—was a greater power than Broderick living with all his mental resources and physical activities. Words were put in his mouth which he never uttered, of a character to feed the flame of prejudice, and every sentiment calculated to awaken a spirit of revenge and nerve the people to action was employed—all this in face of the fact that he had taken a step beyond prudence, and was too obdurate and confident of his own prowess to retrace it, when he could have done so, as the invitation was extended both by Judge Terry and his friends, without detracting one iota from his honor and pride, and without reflecting upon his personal courage.

After having surrendered himself, Judge Terry appeared before Judge M. C. Blake, of San Francisco, and gave the following bond:—

STATE OF CALIFORNIA, }
COUNTY OF SAN FRANCISCO. } ss.

An order having been made on the twenty-fourth day of September, 1859, by Hon. M. C. Blake, county judge of the city and county of San Francisco, that David S. Terry be held to answer on a charge of having, on the thirteenth day of September, A. D. 1859, in pursuance of an agreement previously made with David C. Broderick at the city and county of San Francisco, fought a duel with the said David C. Broderick with deadly weapons, to wit: with pistols loaded with gunpowder and leaden bullets, at the county of San Mateo, in which duel the said David S. Terry, at the county last aforesaid and on the day last aforesaid, feloniously and unlawfully did shoot off and discharge at and against the body of the said David C. Broderick a certain pistol loaded with gunpowder and leaden bullet, which

said bullet so discharged from the pistol aforesaid by force of the gunpowder aforesaid did then and there strike, penetrate, and mortally wound the said David C. Broderick, of which said mortal wound, so inflicted as aforesaid, the said David C. Broderick did afterward, to wit: on the sixteenth day of September, A. D. 1859, die, upon which charge he, the said David S. Terry, has been duly admitted to bail in the sum of ten thousand (\$10,000) dollars.

We, David S. Terry, principal; B. Walker Bours, G. W. Trahern, of the county of San Joaquin; and Myers F. Truett, of the city and county of San Francisco, as sureties, hereby undertake that the said David S. Terry shall appear and answer the charge above mentioned in whatever court it may be prosecuted, and shall at all times hold himself amenable to the orders and processes of the court, and, if convicted, shall appear for judgment and render himself in execution thereof; or, if he fail to perform either of these conditions, that he will pay to the people of the State of California, the sum of \$10,000.

D. S. TERRY,
B. WALKER BOURS,
G. W. TRAHERN,
M. F. TRUETT.

Signed and acknowledged before me this twenty-fourth day of September, 1859.

M. C. BLAKE, *Judge.*

Men of prominence, who stood aloof from politics, and who were allied to no man's political fortunes, who could stand and judge coolly and equitably as between the two, knowing the circumstances which led to the untimely death of Broderick, were not favorable to the conviction of Judge Terry as a reckless violator of the Constitution and the law. So far as the equities of the case were concerned, Broderick had received no more than he expected or could rightly expect, should the case go against him. It was simply a game of chance, in which he had staked his life on the presumption that he was master of the

situation, and he lost. The stake was not so great on his side, as his reputation for uprightness was not so free from successful attack, and this had much to do with the coolness of the men when confronted on the field of honor.

Immediately following the duel, the resignation of Judge Terry as chief justice of the Supreme Court was filed as of date September 12, 1859, but the records in the office of the Secretary of State show that his resignation had not been presented to the proper authority until September 14, one day after the duel. This record is one of the best evidences of the fact that Terry was not hunting for a fight with Broderick, and that he hoped for a peaceable solution of the trouble.

When the case was called in San Francisco, a change of venue was taken to Marin County, and, after three weeks, during which time Judge Terry was present, it was tried before Judge James Hardy, who was afterwards impeached for disloyalty. Judge McKinstry, who occupied the bench of the Seventh Judicial District at the time, was absent in Europe. There were no witnesses on either side, and, after the case was submitted, the jury returned a verdict of "not guilty." An indictment had also been presented against Terry by the grand jury of San Mateo County, and Judge Terry responded promptly. After the jury had been impaneled, Judge Norton, who presided, after examining the papers presented from the Marin County court, showing that Terry had been acquitted on the same charge, dismissed the case. These proceedings, although fully exonerating him in a legal aspect, were

not accepted by the people. The political atmosphere was too heavily charged with the virus of slavery, and the Republican sentiment, which took deep root in the tomb of Broderick, grew stronger. The inexorable march of the antislavery, free-soil sentiment was on its way to a logical conclusion, and it reflected obloquy upon Judge Terry. There was no measure, however small, of either sound judgment or reason, in the temper of the people. How could a true and correct history of such an event have been written and accepted when men were so absorbed in the political situation in the United States? In the face of the facts such stories were told as is found in the following extract which appeared in a Denver newspaper at the time of Terry's death. It is only in keeping with the sentiments which were sent abroad at the time of the duel, and were, as the truth will show, divested of all semblance of truth and self-condemned in the very recklessness of the language used to express the falsehoods. The writer says:—

“The story of the duel as told at the time by men who claim to be fully cognizant of all the details, was as follows, and the writer gives the salient items from memory, as he remembers them, when given to him thirty years ago while connected with the public press of New York City:—

“Judge Terry, who was regarded as a ‘dead shot,’ had assumed to take offense at some alleged public remark of Senator Broderick in regard to the political attitudes of the two parties in California, and sent a man to ascertain from Broderick if the alleged reports were true. His go-between met Senator Broderick

one morning at the breakfast table, and asked if the language attributed to him as having been used against Judge Terry was true. Broderick replied: 'Whatever I said I have said as a senator and a representative of the people, speaking in behalf of my State and my party. I speak freely and aboveboard, in the interests of my party and my country. If I have said anything in my public speeches that reflects upon you in any way, wherein I am wrong, I am willing to apologize.'

"Word was carried to Terry that Broderick meant what he said, whereupon a challenge was sent at once, and arrangement effected that the duel should take place at 6 o'clock in the morning, Broderick allowing his antagonist to choose the weapons, which were pistols, and the meeting-place was in the suburbs of the city of San Francisco.

"During the time the arrangements were being perfected friends got wind of the affair, and, when morning came, officers of the law were found on the spot, and the duel was prevented.

"Another place was agreed upon for the next morning, in an adjoining county, when both parties appeared upon the scene, accompanied by their friends, Terry cool and collected, Broderick agitated and serious.

"Both were placed in position, back to back, twenty paces apart, and each was to walk off ten paces, and at the word, 'one, two, three—fire,' was to wheel and fire. Terry, between the words 'one' and 'fire,' took deliberate aim at his opponent and fired, while Broderick discharged his pistol prematurely into the ground.

Terry remarked, in a cool, deliberate tone, 'I think I struck him too low. I am afraid it will not prove fatal.'

"Broderick was removed to the residence of a friend, and every attention paid him, but the bullet had done its fatal work, and in twenty-four hours after the fearless senator was a corpse, a victim to political hate and intolerant persecution.

"The whole country was thrown into consternation when the facts became known, but all attempts to bring the murderer to justice failed, and the breaking out of the great Rebellion a year and a half afterwards assisted in burying in oblivion all but the memory of one of the tragic events of that period."

CHAPTER XXVIII.

PUBLIC SENTIMENT AGAINST HIM—HE GOES TO VIRGINIA CITY ON A MINING EXPEDITION—RETURNS IN 1862 AND MEETS WITH SUCCESS IN PRACTICE.

In his retirement for a short time Judge Terry was ostracized in business. Even those who were his friends feared to engage his services, as juries, and even judges were more or less swayed by public opinion. He had been making and construing law for the past four years, and his reputation in that matter had not suffered. But a spirit such as Judge Terry possessed was not apt to brood over such conditions long. There were other fields of activity, and in the fall of 1860, in company with Captain John Russell, Lance Nightingale, Wm. Burns, and two other men, he started for Virginia City, Nevada, for the purpose of operating in the mines. On their way they camped in a small valley where a man named Berry kept a hotel. They were all mounted on good horses and armed with rifles. Berry had no feed for their horses but straw, and he was a rather disagreeable man. In the morning Terry complained of the accommodations for their horses, and made some remark about the scanty feed they had had, and Berry, who was a powerful-looking man, became angry and threatened to whip him. Captain Russell, fearing trouble, informed Berry privately who Terry was, and he immediately

disappeared and they never saw him again. The incident was so utterly amusing to Terry that he connected the straw with the man and named it Strawberry Valley, and the name still remains.

Arriving at Virginia City, Terry was advised by an attorney there to take up a claim. He did so. The ground belonged to Hirst & Meredith, a fact which he did not know. It was a portion of the mining ground that belonged to Hirst & Meredith, and when they discovered him there, and knowing who he was, they employed a man named Tom Andrews, a fighting Kentuckian, to run Terry off the ground. Tom told him that the best thing he could do was to get away; that if he supposed it was jumpable ground he was mistaken, and he proposed to defend the property. Terry, who was not inclined to appropriate the property of others, immediately left, remarking that if he was wrong he did not want anything to do with it.

After this he took up a large body of land on the divide between Virginia City and Gold Hill, and walled it in with a high stone wall. Here he sunk a shaft some thirty feet for water, in connection with a man named L. B. Brown. His claim was near the Bullion mine. He failed to get the water, but held the ground until the spring of 1862, when people began to jump his claim for building lots, and he abandoned it. The evidences still remain, and are called "Terry's Wall." During his stay in Virginia City he had a difficulty with two Irishmen who took up a portion of his claim on C Street for a woman known as "the sage hen." He ordered them off and they undertook to whip him. He turned upon them and knocked them both down,

and they got up and left. In the fall of 1862, in company with a man named George W. Elsworth, he left Virginia City for Stockton and never returned.

The excitement incident to the duel with Broderick had not abated, but seemed to grow more intense throughout the State. Public feeling was not directed against him personally, but against the political faction to which he belonged. The most influential newspapers were fanning public sentiment to a white heat of passion in unison with the spirit that seemed to pervade the whole country. The presidential campaign was just closing, and the divided Democracy had but little hope of success. The Broderick elements were also divided in California—a portion for Douglas and a portion for Lincoln, while the Chivalry were solid for Breckinridge. Terry took no active part in the campaign. He was on his good behavior, hoping that after the conflict the calm judgment of the people would set him right and place him in history where he belonged. He had assisted in making a share of history, and, conscious of the rectitude of his actions, he awaited hopefully for the deliberate verdict of the people, unbiased by partisan prejudices. But that time never came. A portion of what he had done became fuel that heated the fiery furnace of civil war, and the high court was dissolved in the clash of arms, following the inauguration of Lincoln. The people had no time, and if they had the time they had no inclination, to study the unities of such an isolated dramatic incident when the nation was in peril.

He returned to the practice of law in Stockton, and he realized that his four years' service on the Supreme

Bench stood him well in hand. He met with a success he had not anticipated. His old friends, and business men, who were averse to him in politics, engaged his services, knowing his eminent abilities, and not forgetting that it was the same man whose honor and integrity had called forth so many sentiments of admiration. While they may have despised his political opinions, they trusted his judgment and his honesty. Political ostracism did not deprive him of personal integrity, business ability and domestic felicity. His noble wife stood by him in all his misfortunes. She cared for and assisted in educating the boys in her charge and performed her part with heroic fortitude. He was quiet and undemonstrative, and maintained his friendly relations with those about him, suppressing his feelings when the first shot was fired at Sumter and for more than a year after, when, in February, 1863, the slender thread of loyalty to the government gave way in his passionate love for his associations in the South, and he left to join the Confederate army.

CHAPTER XXIX.

TERRY AT JACKSON AND VICKSBURG IN THE CONFEDERATE ARMY—HE GOES TO RICHMOND—COMMISSIONED AS A COLONEL—WOUNDED AT THE BATTLE OF CHICKAMAUGA—RAISES A TEXAS REGIMENT—PROMOTED TO BRIGADIER GENERAL.

Judge Terry was a very peculiar individual. He left no footprints of his maneuvers unless moving in the public thoroughfares of life. His private transactions are a sealed book. He kept no journal that would furnish a clue to his actions. He was of all men the most reticent. When he determined to unite with the South in the war, he quietly disposed of as much of his property as he could, and placed his business affairs in the care of B. F. Langford, and in the latter part of January, 1863, in company with W. T. Robinson, Duncan Beaumont, E. B. Grayson, Judge Bowland, Tod Robinson, a Mr. Lovelace and Major Hyatt went to San Francisco, where they took a steamer and left for the South. They stopped at Mazatlan for almost two months procuring good saddle horses and pack animals.

On their way through Mexico to Texas, they passed through Durango, Saltillo, Monterey and Comargo. While resting at Monterey an incident occurred which was pleasing, not only to Terry, but

to all the party. When he first came to California he brought with him a number of his negro servants from Texas. When the constitution was adopted and the State admitted, these slaves were free, and they drifted away. But a slave seldom forgets his master when kindness has been the rule toward him. Two of these former slaves, having learned that their former master had gone South to join the Confederacy, concluded to follow. They proceeded to San Francisco, and upon inquiry learned the route the party had taken, and boarded a vessel for Mazatlan. Here they procured horses and pack mules and followed the party up, overtaking them at Monterey. As they came upon the party, one of them said, "Ah, Massa Judge, you think you run away and join the Confed'acy and leave us behind, but you was mistaken." These two colored men remained with Terry until the close of the war.

After leaving Monterey they went to Comorgo and thence to Kings Ranch, Columbus and Richmond on the Brazos. Here the party stopped and rested two weeks at the plantation of Colonel Frank Terry, the judge's oldest brother, who was killed at the head of his regiment at Green River, for the purpose of recruiting their jaded animals, previous to proceeding to Tennessee, where they proposed joining Bragg's army. It was the wish of Judge Terry to enlist in the Eighth Texas Cavalry regiment, originally recruited and commanded by his brother Frank. After recruiting, they proceeded on horseback to Shreveport, La., thence to Natchez, Miss., and from there to Jackson, where General Jo. Johnson was commanding a small army, attempting to raise the siege of Vicksburg. While

here Judge Terry and others of the party were introduced to General Johnson by Captain W. W. Porter, who was on the general's staff as assistant adjutant general. Terry was invited by General Johnson, with others of the party, to accompany him on his staff, where they remained for a short time, going with him to the Big Black in the rear of Vicksburg, and retiring with him to Jackson after the surrender of that stronghold. They remained with him during the seven days' siege of Jackson, and after the evacuation of that city and its occupation by Sherman and his forces on the 22nd of July, there being no more active operations, Judge Terry proceeded to Richmond to offer his services to the Confederate Secretary of War.

The writer has been informed by a person who was in the confidence of the Confederate Secretary of War that when asked by the head of the department what he wanted, he demanded a commission as major general and the command of a department. He was told that this was out of the question; that such positions were reserved for those who had borne the heat of the conflict and earned such honors by distinguished services. However this may be, he was granted authority to raise a regiment in Texas, and after visiting President Davis, whom he had known while in the Mexican War, he started for the West.

On his way to Texas he fell in with the Confederate army, under Bragg, just a few days before the battle of Chickamauga. Here Terry was in his first and last battle. His brother's old regiment, the Eighth Texas Cavalry, then commanded by Colonel Harrison, of

Texas, was in General Wharton's division, and he volunteered his services on the general's staff. In this engagement he received a flesh wound in the right arm, near the shoulder.

After the battle of Chickamauga he proceeded to Texas, in company with Major S. B. Brooks and Duncan Beaumont, and they formed a regiment of conscripts, and he was chosen colonel, and Brooks lieutenant colonel. Soon after he was commissioned brigadier general.

The immediate department was under command of General Wharton, a brave and gallant officer, and the assignment of Terry to the command of the brigade incensed the military spirit of the senior colonel, named Bayler, who made some remarks while angry derogatory to the fighting qualities of General Wharton. Some unpleasant words passed between them, and, when the general visited the headquarters of Bayler to settle the dispute, in a friendly way, and while the two were alone, General Wharton was shot dead. Colonel Bayler was arrested and tried, and, having presented a clear case of self-defense before a civil tribunal, he was acquitted.

General David S. Terry remained in command of the brigade in Texas until the close of the war, and his command was included in the surrender of troops under General E. Kirby Smith.

Mrs. Terry, who was one of the most remarkable women this country has produced, with her family, joined her husband in Texas. "Her fortitude in the face of inconstant fortune," says a writer, "often evoked the applause of her husband's foes. Circum-

stances making it impracticable for her to accompany him when he drew his sword for 'the lost cause,' she followed on a steamer to San Blas, and thence pushed on overland through Mexico to Texas. Twice on the way she was robbed by bandits, but each time the robbers were apprehended by Mexican officers, and her property restored to her. On the journey her infant babe died, and she carried it for two days on horseback before she found a spot to give it Christian burial. She joined her husband in Texas, and, with the exception of this brief separation, was his constant companion through all the vicissitudes of his eventful life until her death, which occurred on the twenty-fourth day of December, 1884.

The collapse of the Confederacy left him for the time without a country and a home. His proud spirit revolted at the idea of again returning to the State of his adoption, where he had won honor and fame, and where, alas! he had been made the victim of a political prejudice for defending his honor when bitterly and publicly assaulted and defamed. It was his all in life, and a principle which he had guarded and defended above that of his life. The absorbing sentiment which followed had not allowed the public to judge calmly at the exciting moment, and the tremendous results which followed, coupled with the part he had chosen to take in the bloody conflict, only made the situation more humiliating and less easy of solution. By accepting service in the Confederate army he had violated the very principle he had so highly valued, and, under the penalties imposed by the government, having held a high constitutional

office, he was disfranchised, with thousands of his comrades in arms, who had drawn their swords to destroy the government.

The seeds sown in youthful soil take root and become a part of the man. If false to the onward march and evolutions of time, it is called blind prejudice. His was a stern and rocky nature, which yielded not to the changes of customs and the moulding processes of a higher and better civilization. He had read of the transitions which had come about through the intrigues of men of ambition in changing republics into dynasties, and he knew that the people had been made the willing servants of tyrants who had brought about these unhappy results. He imagined that the assault upon the established institutions of the country would end the liberties of the people and establish a despotism, and all his sympathies were with the associations of his youth. Now he was cast upon a sea of doubt, yet the spirit of freedom was alive and burning more brightly, and the test was about to be made. He was not ready to give up the land of his birth. Although humiliated in spirit, he still entertained a hope that wise counsels would prevail, and that the extinction of slavery would not end in anarchy. In the following chapter will be found a short history of the ordeal through which he passed, giving a slight insight into his temper and patriotism under the most trying circumstances and the love of liberty which prevailed.

CHAPTER XXX.

HIS SOJOURN IN MEXICO AFTER THE CLOSE OF THE WAR — WARNED BY FRENCH TROOPS NOT TO CROSS THE BORDER—INCIDENTS AT TEPIC—EXPERIENCE WITH A WEALTHY MEXICAN—FAILURE IN A COTTON-RAISING ENTERPRISE—RELATIONS WITH DR. GWIN—REFUSAL TO ACCEPT A HIGH COMMAND UNDER THE EMPEROR MAXIMILIAN.

The flag he had fought for had gone down in defeat, and, being unwilling to return to California while fresh memories of the bloody conflict were agitating his proud spirit, he took his family and his nephew David, and in company with Colonel Brooks and Major Beaumont, with a number of his soldiers, he went to Parras, Mexico, where they were joined by Captain W. W. Porter, who had served on the staff of General Joseph E. Johnson, and who was afterwards appointed a supreme judge of Arizona by President Cleveland. After spending a short time at Parras prospecting and consulting what best to do, they went to Buena Vista, but were ordered by the French troops then occupying Mexico, not to enter the frontier. Then they went to Tepic, where they remained for several days.

Among the Texans who were with him was one Jack Cavanagh, a reckless, dare-devil sort of a fellow

who had a strong penchant for gambling. After losing everything he possessed, except an old silver watch, Jack undertook to sell it by force to some Mexican soldiers who were stationed there under Marshal Bazaine, who had his headquarters at Tepic at the time. When in one of his ranting moods, trying to sell his watch, Cavanagh picked up an old musket which he did not know was loaded, cocked it, pointed it at a Mexican, and pulled the trigger. Of course the Mexican was killed. Jack was arrested by order of Bazaine, and imprisoned in the guardhouse. As soon as Judge Terry heard of it he went to headquarters and demanded his release, as the shooting was an accident. The military discipline under Marshal Bazaine was extremely rigid, and he refused to release him. Terry became exceedingly angry, and things became lurid around about the headquarters of the marshal of the empire for a few minutes, and whether he understood the peculiar activities of Judge Terry or not, it was observed that Cavanagh was released in a short time. What really did occur between the two was never known, for Terry was ever reticent, and never talked about his prowess, his victories, or his defeats on any occasion.

From this place they received passports to San Luis Potosi, and thence to the Pacific Ocean, and here Judge Porter and Major Brooks left him and returned to California. Leaving his family and the Texans, who had followed him at Mazatlan, Judge Terry and Major Beaumont went to Guadalajara and made arrangements with a prominent Mexican to engage largely in wool growing. He leased an extensive

hacienda, and returned to Mazatlan. How to stock his ranch was troubling him, as he did not care to go to California in person, when his noble wife came to his rescue and tendered her services. She came to California and purchased a band of sheep, and some fine horses, and during her absence he waited at Mazatlan. The stock were shipped to San Blas, whence they were driven to Guadalajara by his Texan comrades. When he arrived at Guadalajara the Mexican had changed his mind for some reason, and would not fulfill the contract. While he could get no satisfaction, it was supposed that the military authorities had interfered, as they were very suspicious of strangers on their territory at that time. He disposed of his sheep as best he could, retaining his horses, and went to the valley of the Santiago, and, in company with Beaumont, concluded to engage in raising cotton, which industry he was familiar with. During the two years from the spring of 1864 until the autumn of 1866, the French, under Maximilian, had possession of Mexico. At that time Hon. Wm. M. Gwin, ex-United States senator, was in Paris, intriguing with Emperor Napoleon for the privilege of colonizing Sonora with refugees from the States then in Rebellion.

Although having espoused the Confederate cause, Gwin, who had assisted Mason and Slidell in Paris in the effort to secure a recognition by France of the Confederate government, had lost all confidence of a successful issue, and turned his attention to this new scheme of colonization. In this he saw an asylum for those who had lost their all in the conflict at arms, and also some compensation by way of prosperity in

his own behalf. He pressed the emperor by the strongest appeals, but Napoleon was slow in yielding to his ambitious desires, as the stability of the throne of Maximilian was not guaranteed. Judge Terry was in communication with Gwin, and his movements in Mexico, as an observer prepared to occupy the country and be the pioneer under the new order of things, was emphasized by the presence of the ex-Confederate soldiers who had accompanied him into Mexico. There were others in this enterprise, but not familiar with the secret movements going on as was Terry. Gwin was the master spirit, and through his intrigues, which became the public property of the Mexican Minister by accidentally falling into the hands of the American Consul at Vera Cruz, he was dubbed "Duke of Sonora." It was with more than ordinary solicitude that Judge Terry watched the movements of the contesting forces, for Benito Juarez was a shrewd, brave, and untiring defender of the republic. His pure Indian blood was running hot and his determination to drive the French and Maximilian from Mexico was strong.

It was possibly true that the French had knowledge of the fact that Terry was operating with Gwin, and having become acquainted with his history as an able, daring, and fearless man, and a general in the Confederate army, he was tendered a high command in the French army by Maximilian. Here was an opportunity for him to retrieve his lost fortune and become a hero. At the same time he would have been relieved of the necessity of enduring the presence of his old friends and associates who had with-

drawn their sympathy from him when he deserted the Union and took up arms against the Constitution he had so often sworn to protect and defend, and in defense of which he had imperiled his life in opposing the Vigilance Committee. Terry was too shrewd not to see the drift of events. He knew the empire would fall, but he had some confidence in the enterprise of Gwin, which could be easily adjusted by the republic of Mexico, as it did not disturb its autonomy. He frankly refused the intended compliment, with the remark that he could not accept a position of honor or trust under a monarchy in Mexico, as the United States was too closely allied to the territory, and too jealous of the crowns of the Old World to sit quietly by and permit any nation in Europe to establish an empire in North America on the ruins of a republic.

In connection with the understanding existing between Gwin and Terry, the following letter will be sufficiently self-explanatory:—

CITY OF MEXICO, July 2, 1865.

MY DEAR COLONEL: After coming to Mexico armed with authority from Emperor Napoleon, directing, or recommending, Marshal Bazaine to detail a sufficient force of French troops under his command to protect colonists in Sonora for a short time, I find the Emperor Maximilian opposed to lending any military assistance to my humane scheme for the development of the resources of the territory and the suppression of Indian hostilities. He fears the Anglo-American spirit, believing that it is my intention, with that of others, to play a ruse in order to usurp the empire and dethrone him. He thinks the people of the United States are all Yankees, and are only grasping for power and the subjugation of all the territory of North America. In fact, he positively refuses to give us any military aid and my mission in that respect is practically at an end. It would be rash to undertake any such scheme as I have had in contemplation without the

aid and assistance of the French army of occupation, for the small force under your orders would not be sufficient to check the ravages of the Apaches, and it would be construed as an act of hostility on the part of the United States and Mexico, or a filibustering scheme on the part of irresponsible persons, unlawful, and subject to condemnation for you to strengthen your forces sufficiently to protect us in our colonization. As an aid to the French troops until such time as sufficient numbers could be colonized for self-protection, it would be well enough, for outside of a military force there can be no serious objections to the scheme. Knowing the strength and determination of those who oppose the empire, and who leads and counsels with them on this occasion, it looks too much like opposing friends to assume the responsibility. Such a responsibility must be assumed by the emperor to protect us.

I know you would dare to do anything you thought was right, but Juarez is not the man to antagonize when the imbecility and instability of the empire is so apparent. I leave to-morrow for the States, having abandoned hopes for the success of my mission. Your excellent judgment, my dear colonel, will be your best guide as to your future movements.

With great respect, your obedient servant,

W. M. GWIN.

His cotton-raising enterprise was not a success. After two seasons of labor, and the failure of Dr. Gwin to organize his Sonora colonization scheme, he concluded to return to California and put forth his best energies to eradicate from his former history the wrongs placed upon his name as a result of his duel with Broderick, which became a plague spot through the inexorable force of political environment. His high spirit and sensitive nature were overcome by the necessities which confronted him, and after spending a few months in Pioche, Nevada, he arrived in Stockton in the fall of 1869.

CHAPTER XXXI.

RETURNS TO CALIFORNIA AND SETTLES IN STOCKTON—
RESUMES HIS PRACTICE WITH SUCCESS—IMPOR-
TANT CASES IN WHICH HE WAS EMPLOYED—
CONFIDENCE IN HIS ABILITIES—HIS MASTERLY
DEFENSE OF THE "CHRONICLE" AGAINST THE
"FEDERAL BRIGADE."

On his return to Stockton, after an absence of six years, Judge Terry found his old home had been consumed by fire, and his first work was to place his family in a comfortable position. He rebuilt his house, opened a law office, and sat quietly down to await the result. It was not long until he was satisfied and pleased with the assurance that his old friends had not forgotten him, and that he had not suffered by his allegiance to the South. It was not a man's opinions they wanted; it was his abilities and his worth. In a very short time he was in full possession of his former practice, and, although some changes had taken place during his brief absence, he very readily made himself acquainted with the new order of things. He was now living in a country absolutely free, and, with that heroic philosophy which avoids a conflict with fate, he accepted the situation as the "inexorable logic of events," seldom referring to his former life or the incidents that had special

reference to the changed condition of social and political affairs.

He was still a Democrat, but took no part in politics, being one of the many who fell under the ban of political ostracism by the reconstruction acts of Congress. He had lost heavily with the "lost cause," and, to retrieve his fortune, he must be diligent in business. He had lost but little in physical vitality, his robust frame having proved equal to the arduous conflicts he had endured. His strong intellect was unimpaired, and his unyielding fortitude never wavered. He put forth all the energies he possessed, and for the time was free from the exercise of that violent passion which nature had given him as a birth-right, to lead him to a tragic death.

In his practice Judge Terry was engaged in a number of important cases, and his services were sought by litigants in all parts of the State, but more particularly in the San Joaquin Valley counties. In 1874 a young man named Granice, of Merced, in defending the reputation of his mother (Rowena Granice Steele) from newspaper attacks by the editor of the Merced *Express* (Madden), shot and killed him on the street. Terry defended him, and, after having been tried twice, and convicted and sentenced to State prison for thirty years, Terry secured his release on a technicality. He seldom resorted to such means, but in this case he only took advantage of an error in the proceedings. The Supreme Court, upon application, had granted a new trial. After being arraigned on the same indictment, and the evidence all in, the district attorney, in conformity with the

provisions of the code, moved that the jury be discharged, and the prisoner remanded to await an indictment for a higher crime, the testimony going to show that the charge should be murder. This was done, and Terry permitted it with silent satisfaction. An indictment for murder was found by the grand jury, and he was convicted and sentenced. Terry took an appeal to the Supreme Court, on the grounds that the discharge of the jury when first arraigned and tried was equivalent to an acquittal, and the Supreme Court sustained him.

In 1868 his brother, Aurelius J. Terry, who had been in California in 1850, died in Texas, leaving a son who was only nine years old, and Judge Terry took charge of and directed his education. He studied law, and is now an able and brilliant attorney of the Fresno bar. He was a candidate for Congress in 1888, and made a brilliant campaign. The odds were too great, and he was defeated, but retained his well-merited character for ability and intelligence before the people.

As is true of any political party, the Republicans became corrupt through a long and continuous lease of power in the Federal government. Aaron A. Sargent was United States senator, and Horace P. Page was congressman from the Third District. In the dispensation of patronage they had done some questionable work in manipulating the service at Mare Island Navy Yard, and their conduct reflected disgrace upon the party and the nation to such an extent that the San Francisco *Chronicle*, the leading Republican paper of the State, indulged in severe per-

sonal criticism, denouncing their peculiar methods. Smarting under the lash, they brought suit against the publisher of this newspaper on a charge of criminal libel. In selecting a man of commanding ability as counsel in the case, one who was honest and fearless in opposition to political frauds, and whose character was above reproach as a lawyer, he trusted his case in the hands of Hon. David S. Terry. It was a memorable suit, and creating a national notoriety. All the energies of the government officials were employed to prosecute the case and clear the skirts of the officials charged with the grave offense. The case was tried twice, and, although a verdict of acquittal seemed impossible, there was no conviction, and the disclosures made by the efforts of Judge Terry left the odium on the skirts of the senator and representative. His peculiar skill and abilities placed Judge Terry on a level with the ablest attorneys in the State.

During the ten years following his return to Stockton, in 1869, he labored diligently and earnestly to fortify his previous reputation for honesty and integrity by his acts and general demeanor. He had lost none of these eminent qualities, although he may have added something to the prejudices that still existed on account of former acts, which had made him notorious by engaging in the Civil War on what was considered the wrong side, which proved to be not a revolution, but a treasonable revolt that failed of its purpose. He controlled his evil genius with remarkable fortitude on all occasions, although it was that part of his nature for which he was scarcely respon-

sible, and which led him into all his troubles. Probably this was principally owing to the fact that no supreme occasion presented itself to arouse his passions. His son Samuel became his partner in business, and with him came a still larger practice, as he was the very opposite of his father in his friendships, and was greatly admired by all his associates.

CHAPTER XXXII.

ELECTED A MEMBER OF THE CONSTITUTIONAL CONVENTION OF 1878-79—OPPOSITION TO HIS BEING SWORN IN BY THE WORKINGMEN—HE SEES HIS OPPORTUNITY—HIS SPEECH ON FREIGHTS AND FARES.

There were no eventful incidents worthy of note compared with those which have been recorded during these years of professional labor, which were devoted energetically to retrieving a wasted fortune until the year 1878. The Legislature of that year had passed a law providing for a convention to revise the constitution, and delegates were to be chosen. He was solicited to become a candidate by the people of San Joaquin County, independent of party. In looking over the field they could find no man whose eminent abilities and whose qualifications fitted him for the trust equal to Judge Terry's. They knew they could trust him, and as the bitterness of the opposition to him on account of past transactions had ceased to be a byword and reproach, he allowed his name to be used, with the distinct understanding that he would not be required to go before the public in support of his candidacy. Happily, this was the plan adopted by the non-partisan elements. There were a number of politicians in the State, members of both

of the political parties, who did not believe in non-partisanship in anything, and they nominated separate tickets and made a strictly partisan fight for control of the convention. In conjunction with these partisans was the labor element, then agitating the centers of population throughout the State. The effect of these movements was to elect the whole non-partisan ticket at large, but the workingmen secured a large number of the members of the convention, San Francisco being almost solidly represented by that element. Judge Terry was elected by a large majority. It was a pleasure to him, and the people were also pleased to know that they had in him as a representative one who would reflect credit upon them by his great abilities, and as he had never betrayed a public trust, they knew his labors would be directed in the right channel.

Denis Kearney, a political mountebank who had arrayed the laboring classes and the disturbing, dissolute elements of San Francisco and the State against capitalists and men of enterprise, in his endeavors to awaken a spirit of anarchy, had control of the city government of the metropolis. Enough of his representatives had secured seats in the convention to cause alarm, and it required considerable ability and good judgment to circumvent their evil intentions to frame a constitution which would have the effect to drive capital out of the State and paralyze the prominent industries. Understanding the motives and nature of this class, Judge Terry espoused their cause at the beginning, and they made him their leader. By this piece of consummate tact in securing their con-

fidence, he controlled them, and, in so doing, avoided many of the monstrous and unwise provisions which otherwise would have been engrafted into the constitution, either causing its defeat before the people, or impairing its usefulness if adopted. As it was, there were several provisions which they insisted upon, and having the power, they succeeded in adopting.

One of the prominent leaders of the Kearney faction in the convention, was C. J. Beerstecher of San Francisco. When the name of David S. Terry was called at the organization of the convention, Beerstecher arose and objected to his being sworn in. He was followed by C. C. O'Donnell and James O'Sullivan, all sand-lotters. Beerstecher has since been hushed by the monopoly on a small ranch in Napa County; O'Sullivan has been relegated to his normal quiescent condition, and O'Donnell has been a candidate for any office in sight, at every returning election, from governor down to coroner, in the interests of the anarchical elements ever since. Governor Irwin, who presided over the convention during its temporary organization, promptly squelched this effort by saying:—

“The gentleman will please take his seat; the gentlemen are out of order. The law makes it my duty to swear in the persons elected to the convention. Then any objection to the eligibility of members can be raised. The power to determine who are members rests in the convention, and not in the Governor, who presides temporarily.”

Judge Terry did not ignore this feeling of preju-

dice by allowing it to pass without an afterthought. Having been on his good behavior for a long term of years, he had learned to be somewhat politic, and concluded to use that ingredient in the exercise of his official duties as a member of the convention. He had the ability, and he had the good judgment to see beyond the surface, and to reach and control this adverse spirit was his determination. In view of the condition of things he knew that patience must be exercised, and generosity exhibited, which would be felt and appreciated. Hence he was reticent for a time, although he had been placed upon two of the most important committees in that body—the judiciary and legislative—to the latter of which he was added after the convention had been at work for several weeks.

It is eminently proper in this connection to present his speech in this convention which called to his confidence this disturbing element, unfortified with ability, yet powerful in numerical strength, and so intensely irrational in their ideas that he might control them to a certain extent, and avoid the consummation of fatal errors by any rash mistakes that would provoke a righteous hostility to the instrument they were engaged in framing. Upon the question of corporations he saw his opportunity, for it involved, to a great extent, the employment of Chinese and the exclusion of the white race. The question in committee of the whole was the powers to be granted to the railroad commissioners, a body which the convention had determined to create. The immediate question under discussion was the subject of unjust discriminations

in freights, a protest having been submitted by the directors of the Southern Pacific Railroad Company. In it was incorporated a clause that if the railroad company, by any attempt to shut out competition, should reduce their rates for fares and freights, they should not have the power or privilege of raising them again. On this question Mr. Terry said:—

“Well, if the railroad company, by putting down their rates, choose to commit hari-kari, for myself I have no objections to it. I think that the amendment of the gentleman from Los Angeles is eminently proper, and ought to be adopted; that they themselves are the best judges of what they can afford to carry freight for, and if for any purpose they announce their willingness to carry for a certain rate, they should be held to their contract, and not be allowed to raise it.

“Some allusions have been made to the magnificent donations of money, property, and credit which have been made by the Federal government, by the State of California, and by the several counties in the State. The gentleman from Marin asserted that these were free gifts, without any conditions; that after the property passed it became the property of the railroad, and that they were under no obligations to the donor. True, sir, the recipients of a gift are under no legal obligations to the donor, but the obligation of common gratitude is held to be an obligation by most natural persons. There was an implied understanding, at the time when these donations were made to this corporation, that the property which was given to them, and the money which they were endowed with, was not to be used as a weapon against the donors;

not to be used for the oppression of the people by whom the money was given. It is true that it gave them an opportunity to increase the resources of the State, and it is supposed that they would use it so as directorship acquired wealth. I have not heard of any others reaping any considerable profit from it. It is said that, by forming a contract and finance company, and taking a contract from themselves to build the road, they put into their own pockets all of the money that came from the various sources into the corporation. However that may be, I know of some stockholders who never got rich from the profits of this corporation. The county of Placer became a stockholder to the amount of about \$300,000—certainly twice as much money as any of the present owners of that enterprise ever put into it of their own; and, according to the wealth of these men, estimated at from \$8,000,000 to \$15,000,000, the county of Placer ought to have had \$15,000,000 or \$20,000,000. I would like to have my friend from Placer, Judge Hale, tell me how much that county made out of it. The county of Sacramento was also a subscriber to the stock to the extent of some \$300,000. Certainly that was more than any one of these individuals put in; and, while they have their \$15,000,000 or \$20,000,000, and are living in opulence, how many dollars has the county of Sacramento realized? The county of Santa Clara subscribed \$250,000, and the county of San Joaquin \$250,000, and, as the owner of twenty-five hundred shares, according to the profits made by the directors, who certainly did not put in half that amount to the man, ought to have had \$20,000,000,

and not one dime of it has ever gone into the treasury of that county. Now, is there not some reason why people should look with some displeasure upon the accumulation of these large sums in the hands of a few men who are charged with using it for their own interests, for a corruption fund in the Legislature, and, perhaps, in some instances in the courts of justice?

“It is our duty here to adopt some plan by which the people of California are to be protected against this tyrannical corporation, because it has just come to be this question, either you have got to govern that corporation, or the corporation will govern you. That is the question which the convention has got to determine first, and the people afterwards. I examined, with a good deal of care, the twentieth section of this report of the Committee on Corporations, and I could not bring myself, as I thought, to support it; but I must confess that my determination to vote against that section was very much shaken by what might have been a warning or threat, one or the other, held out by the gentleman from Sacramento, Mr. Edgerton, in his eloquent address upon this subject. He intimated that the passage of that section would drive this corporation into politics, and that they would probably be able to control the election of these commissioners, and, owning them, they can discharge five or six thousand Chinamen, and employ voters in their stead. Now, gentlemen, if I was certain that even that much good would result from it; if I was certain that five thousand Chinamen would be discharged, and that five thousand citizens would be employed, and thus be able to earn an honest living for their

families, I would be almost tempted to vote for it, with all its faults. If it secured the discharge of aliens and employment of citizens who have families to support which would add to the future prosperity of the State, it would go very far to counteract the evils which might follow from this power in the hands of three men. I have too much regard for the honesty and intelligence of the people of this State to believe that the elections can be controlled by such measures. The people have seen too much of that in the past. In spite of all their influence, a square vote of the people of this State will sustain any measure which is intended to curb the grasping avarice of that corporation, and prevent further oppression upon the people of this State.

“It is said that they themselves are the best judges of what they can charge; that no information can be obtained which will enable the Legislature or convention to fix the rate at which their road ought to be run. And it is said in the argument against the amendment of the gentleman from Los Angeles, that some man might get a stage line, have a parcel of old stages on the line, and blackmail the railroad company, and might say, ‘If you don’t come down with so much money I will run opposition to you,’ and they would be compelled, unless they could put down their freights and fares, to submit to blackmail. Well, gentlemen, I have always heard that one of the principal arguments in favor of fostering these railroad corporations was that it would secure a cheaper mode of transportation than stage coaches and mule teams. If that is not true—if the railroad company cannot afford to

carry both freight and passengers at rates cheaper than stages and mule teams—then the sooner the corporations are destroyed the better for the future of California. If the freights are the same and the fares are the same when this work is being done by mule teams and stages, they are the best. for the profits of transportation are shared by the whole community. The farmers in the first place sell the animals, the wagon makers make the wagons, the farmers raise the grain and hay to feed the animals, the blacksmith shoes them, the harness maker makes the harness, and the money is scattered over the country to every class of people in it. Whereas, the profit arising from the freights and fares of the railroad company goes, most of it, into the hands of a few enormously rich men, and the balance into the purses of aliens who do not expect to become citizens of our country, and some here only upon the expectation of gathering as much as they can of the fatness of the land in the shortest possible space of time, and return with it to their own country. I say that, unless the element of cheapness comes in, they are an absolute curse to the country.

“What effect have they had? It is said they increase the prosperity of the State. Why, who ever heard of an able-bodied man in California going around and begging for a meal, or begging for the privilege of working, until these thousands of coolies were imported and employed by this company? What a spectacle was witnessed in San Francisco the other day when one of these magnates gave notice that a certain number of men might be employed at \$1.00 a

day and find themselves, to do some work, and hundreds of men were sitting there all day long, more having offered than could be employed, begging for an opportunity to earn even so small a sum. Is not that scene witnessed every day? Are there not hundreds of able-bodied men willing to labor who are absolutely deprived of the privilege of earning, by their own labor, the price of the food that is necessary to sustain life? deprived of the liberty of carrying out the primeval curse which was placed upon man, to earn his bread by the sweat of his brow?

“And we are told that this is private property; that we must not interfere with it; that the Central Pacific Railroad Company are the best judges of the prices at which they can run. Well, so they are the best judges, and so they would be if they were guided by the commonest principles of fair dealing; but their judgment is altogether exercised upon the side of self. It was shown by the statistics read here the other day that out of the gross earnings the profits were more than ten per cent greater in California than any other railroad in the United States. I believe the highest was thirty-six per cent in the other States, while it amounted in this State, according to the report of the commissioners, to fifty-six per cent. Now, these men have made enough out of this magnificent corporation to be willing hereafter to deal fairly. We know that they won't deal fairly, and it is our duty to make them do it. It is our duty to prevent discrimination between places. They start out their railroad track, and survey their line near a thriving village. Two or three cases of that kind happened

between here and Lathrop. They would go to the most prominent citizens of the village and say, 'If you will give us so many thousand dollars we will run through here; if you don't, we will run by,' and in every instance where the subsidy was not granted, that course was taken, and the effect was just as they said, to kill off the town. Here was the town of Paradise, in Stanislaus County; because they did not get what they wanted, they established another town four miles from there. In every instance where they were refused a subsidy in money, they have established a depot near to the place, and have always frozen them out. As stated by the gentleman from Los Angeles, General Howard, they blackmailed Los Angeles County \$230,000 as a condition of doing that which the law compelled them to do.

"Now, it is for us to do something to prevent this discrimination. We can say to them, and it is our duty to say to them, 'If you undertake to publish to the world that you are able to carry a car or ton of freight, for \$5.00, a hundred miles, you shall not charge the same rate for fifty miles. If the price from Sacramento to San Francisco is \$2.00, you shall not charge more to Davisville or to any intermediate point.' This is doing them no harm. They say they charge less to San Francisco, because there is competition, because people can send by another route and they lose the freight. Very good. If they are obliged to carry freight at a loss, then it is their interest to lose it. But they are not carrying it at a loss. They certainly get pay for it or they would not want it. If there was a hundred tons of freight to

carry, and they were going to lose money in carrying it, they would rather some other kind of conveyance would take it. So it is absolutely certain that they are not carrying freight anywhere at a price so low as to lose money. Then if they do not lose money, they can afford to carry fifty miles at the same price they do one hundred. They can afford to carry to any intermediate point upon the same road for the same that they do the whole distance.

“I do not propose to detain this convention any longer in what I have to say, and end as I begun, by saying that the amendment proposed by the chairman of the Committee on Corporations ought not to be adopted; that in the very nature of things there can be no discrimination between individuals as to railroad facilities which is not unjust upon the very face of it, and we do not want any question raised or any trials had as to whether it was unjust or not. Say, ‘You shall not discriminate.’ If John Smith comes to you with a ton of freight treat him the same as if Peter Jones came to you with the same kind of freight, and give him the same advantages. The putting in of that amendment, the insertion of that word ‘unjust’ here, would give rise in every case to litigation and inquiry. Just have it understood that they shall not discriminate. We decide here in this convention a fact that is patent to every man, and we say, ‘You shall not discriminate at all.’”

CHAPTER XXXIII.

HIS SPEECH ENLISTS THE SYMPATHIES AND SUPPORT
OF THE SAND-LOT ELEMENT—WITH THEM HE
CONTROLS THE CONVENTION—HIS MASTERLY
EFFORTS IN BEHALF OF THE PEOPLE—INCIDENT
OF THE PEACHY CHALLENGE.

It will be seen by this speech, which was rather a lengthy one for Mr. Terry, that he took the most ultra grounds against corporation oppression and Chinese labor. To borrow an expression, he “out-Heroded Herod,” and completely unseated the leaders of the sand-lot element in his vigorous language. It was the opportunity he had looked for, and he was not slow to take advantage of it. Even the men who had objected to his being sworn in, yielded to him the honors of a leader on their line of thought and action. Although strong and forcible as this speech was, the more conservative and able members of the convention were well enough acquainted with him to know that he would not overstep the bounds of prudence and good judgment by leading these less-talented members, who were thrust into the convention on the crest of an uprising, into any foolish acts. He was now in position to restrain them from committing any acts of folly. “The Chinese must go,” had been their battle cry, and no words could have been uttered

to please them better than those uttered by Mr. Terry in this debate.

Upon the final adoption of the section, Mr. Terry, desiring to give the railroad commissioners power to perform the duties of their office so as to produce the most good, after stating that in the beginning he was not in favor of a railroad commission, offered an amendment to section twenty, as follows:—

“Resolved, That the Committee on Corporations other than municipal be instructed to further amend section twenty, so as to give the commissioners power to punish for contempt of their orders and processes in the same manner and to the same extent as courts of record.”

This resolution was adopted and the amendment made. Terry had now the support of the working-men, and he could work with an almost absolute certainty of carrying every point he desired. He was therefore careful, for he was animated with a desire to aid in fashioning an instrument that would be adopted by the people and be a credit to its framers. Larkin and Beerstecher were his greatest admirers, and they were the most brilliant and promising representatives of the Kearney movement.

On the question of the law of libel, an attempt was made to change the construction already established, in respect to the duties of judges and juries. In this discussion Mr. Terry said: “The principal reason for not changing it is, that the clause as it stands has been construed. It has been a part of the constitution for thirty years. If we amend it now by striking out the provision that the jury may judge of the law and the fact, will not the presumption arise

upon the construction of the section as passed by this convention, that it was the intention of the convention to change the rule? The questions of law and fact in prosecutions of this kind are not separate as they are in other cases. It is difficult to tell where the question of fact ceases and the question of law begins. It is not sufficient in this prosecution to prove the truth in the case. If it were there would be no difficulty. But it is not sufficient to show that the fact is true. You must go farther and show that the motives were good and the ends justifiable. The fact as to whether the ends are justifiable or not is a question of law. I have no right to speak about a private citizen if it reflects upon his character; but if he is a candidate for office, or if he is applying for a position of trust, and a man comes to me and asks me about his character, then I have a right to tell the truth about him, and the communication is privileged, but it is always a question of law as to whether it is privileged or not."

On the question of limiting the pardoning power vested in the Governor to cases where new evidence has been discovered after judgment establishing the innocence of the party convicted, or the injustice of the sentence, he opposed it with all his energies. In his remarks he said:—

"It occurs to me there are very many instances where a party properly convicted should receive executive clemency. For instance, for a certain offense the statute allows a punishment of from one to four years. It is absolutely in the discretion of the judge. And in case of a first offense, where punishment has been wrongfully inflicted, why should not the Gov-

ernor have a right to step in, after a lapse of a reasonable time, and relieve him from the remainder of his sentence? There may be instances where boys have wandered away from home and have committed crimes, and have been tried and properly convicted, and sent to prison. Suppose a case of this kind: The friends of the party, living in other States, think they can reform the boy. Nobody was ever reformed in San Quentin. No man ever left there a better man than when he went in. He is sent there to mingle with the most hardened criminals, and he becomes more and more degraded, and he leaves there an accomplished criminal. Why should not the Governor be permitted, if the parents of the boy come from another State and ask that he be pardoned on condition that he leave the State never to return, to grant the request? This convention ought not to take away the power to grant relief to anyone who is wrongfully imprisoned or too harshly punished. I do not believe this convention is prepared to adopt an amendment of this kind, and this amendment in effect will do it."

There is something concerning Mr. Terry's services in this convention which will challenge the attention of the reader. He seldom indulged in discussion, and when he did so it was briefly. On questions of great concern he was ready and willing to give his views in his own way, always keeping in mind the subject, and presenting them in the most practical manner. He wished to keep within the comprehension of a majority of the men representing the element he had determined to control. It was not a hard task for

him to do so. He had educated himself to that end, and adopted the plan of condensation before juries and in presenting his views in all his decisions and opinions when a justice of the Supreme Court. While he was very plain in speech, he was logical in reasoning, and there are but few instances in the records of this constitutional convention in which his judgment was at fault and the propositions he championed were not adopted and made a part of the constitution. When the question of the liability of stockholders in corporations and joint stock associations came before the convention, the report of the committee made no mention of the liability that should attach to directors or trustees. Mr. Terry, knowing the frequency of embezzlements in banks and other monied institutions, introduced an amendment to the report, as follows:—

“The directors or trustees of corporations and joint stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint stock association during the term of office of such director or trustee.”

The object of this amendment was to protect deposits in savings banks from misappropriation by directors or officers who really have no stock in such institutions. In presenting this amendment, Mr. Terry said:—

“I desire to say a few words in explanation of that amendment, and the reason why it was offered. The whole business of these corporations or banks is under the control and management of the directors. The subordinate officers are elected or appointed by the

directors, and there is no unfairness in making them sureties for the persons they have in their employment. They have the power to exact bonds to indemnify themselves. The only object is, so far as the stockholders of a corporation are concerned, to make these men who appoint the cashiers, tellers, and clerks, responsible for the faithful discharge of their duties. They can take a bond if they desire it. Under the laws it is the duty of these directors to exercise a supervision over the officers of these institutions. I know instances, and they are very common, in banks where thousands of dollars of money are being used daily, that these directors have failed for months and years to exercise the supervision which the law requires them to do, and why should not they be held responsible? I know one case where the by-laws of a bank required that the directors should, once every month, examine the books, count the money in the vaults, and examine into the business generally, and it came out in evidence that they had not performed that duty one time in three years. This is for the mere purpose of preventing such neglect of duty. If these men understand that they are sureties for the officers appointed by them they will examine the books and the affairs of the bank. We know, too, that these robberies are not accomplished in a day or at one time. It is a systematic speculation running through years, which, when discovered, amounts to a very large steal. If these officers will attend to their duties, these speculations cannot occur, because they will discover them before they have fairly started. The case of the French Bank in San Francisco is one

where the directors never did perform their duty. The whole matter was left in the hands of the president, and the consequence was that, after a series of disastrous speculations in stocks, he left the world by means of suicide. I say these men have the appointment of these officers, and, if need be, they can take a bond for their own indemnity."

A number of the most prominent and able members of the convention—Mr. Estee, Mr. Shafter, Mr. Wilson, and Mr. Barnes—objected to the amendment, and declared it would weight down the constitution before the people, but Terry was getting to be quite a politician, and he answered them as follows:—

"The effect of this amendment is simply to make these directors or trustees—by whatever name they are known—the sureties on the bonds of the cashier and teller; that they will perform their duties properly, placing them upon the same plane with other sureties. Suppose a case of a State treasurer or county treasurer. It is no excuse if I go on the bond of the State treasurer or a county treasurer, and he appropriates the money. It is no excuse, I say, if I am innocent, and didn't know he was going to do it; that I thought he was honest; that I ought not to pay the bond, as the gentleman from San Francisco, Mr. Wilson, said. No, I went on his bond with my eyes open, and I am required to pay. I do not pay because of any misconduct of my own. . . .

"If this amendment is adopted as a part of the constitution which is to be submitted to the people of this State, the gentleman from Maine need have no fears that it will weigh down the constitution. You

will have no more respectable men allowing themselves to be made decoys of. You will have no more figure-heads in the shape of boards of directors, who never go near the institution from one end of the year to another. You put the responsibility upon them and you will force them to do their duty. That is the only way you can force them. . . . But gentlemen get up and talk about this being a great outrage, and get very indignant over it. There is nothing that would give grounds for any such talk. It struck me as a provision which should go into the constitution in connection with the other provision making stockholders liable. It struck me as a provision, the need of which I have seen in this State many times, and it would prove a safeguard to the people and to the stockholders. It would prevent a repetition of the too common abuses of the past, without doing injustice to any honest man. I do not know who was alluded to when it was said by a gentleman on this floor [Mr. Barnes], that perhaps some of the members at the great Judgment day would expect to sit alongside of the supreme judges or associate justices. When that day comes, if come it does, when we are wafted across to the other shore, I shall not be surprised to see at that very moment the immaculate chairman of the military committee of this convention the eminent commander of the ceremonies there. [Laughter.]

“Now, I think the sense of this convention is that something should be done to prevent the robberies of the public by corporations, and it does occur to me that this is about the most effectual means of preventing it. It occurs to me that the Constitution is

the place in which to put it, where it cannot be amended or repealed at any time by a hasty Legislature. I do not approve of the amendment offered by the gentleman from Alameda, Mr. Van Dyke, and would not accept it, because, if I did, I fear that sometime in the future the law which now makes these officers appointed by the directors, would be changed, and thus the provision of the constitution would be evaded and defeated. They might thus defeat the action of this convention. I propose to put it here as a safeguard to the people and where it cannot be amended or repealed, and let it stand for all time as a protection to the people of this State against the robberies which are committed by the officers of these corporations. [Applause.] Gentlemen need not be afraid that this will weigh down the constitution. Put that provision in there and it will, like charity, cover a multitude of bad provisions when it comes to go before the people for ratification."

Mr. Casserly inquired, before the final vote was taken, if the gentleman from San Joaquin understood the amendment to include "charitable, benevolent and religious associations."

"I deem it includes all corporations," said Mr. Terry. "I do not think a charitable or religious corporation has any better right to steal money than a lay corporation."

The amendment was adopted, and it furnished the strongest argument by the corporation against the adoption of the constitution before the people. Money was used in all parts of the State, but the people gave their emphatic protests against all such methods.

Mr. Terry was opposed to the State, counties, or any municipal corporation loaning their credit in aid of any person, association or corporation, and introduced the section which became a portion of the constitution on that subject. Mr. Terry was a strong advocate of limiting the term of the legislative session to sixty days, basing his opinion upon the constitutional provision which excluded all special legislation, which served to consume so much of the time of former Legislatures. He was right in view of an honest interpretation of the provision, but, like many other provisions of the constitution, that one has been evaded, and there are more attempts at special legislation now than under the old constitution. The provision making the title express the subject of a proposed law has been totally ignored by experts in legislation, and the proposition to amend the constitution by extending the term to one hundred days is simply the result of the work of these experts in contravening the constitutional provision. Of course this provision, like all others contended for by Mr. Terry, was adopted, having, as they had, the support of the labor element, which relied upon the judgment and advocacy of so eminent a leader, and a man whose honesty, integrity, and general knowledge of laws had never been impeached either directly or by innuendo.

CHAPTER XXXIV.

HIS ARGUMENTS AGAINST STOCK SPECULATORS—
VIEWS UPON REVENUE AND TAXATION—SHARP
DISCUSSIONS BETWEEN MEMBERS ON THE TAXA-
TION OF EVIDENCES OF INDEBTEDNESS—TERRY
TRIUMPHANT.

His speech in the convention on the provision affecting the stock market and mining stock sales is worthy of a place in this book. The article or section submitted was one taking from the Legislature power to authorize lotteries or gift enterprises; also to regulate or prohibit the buying and selling of the shares of the capital stock of corporations in any stock board, stock exchange, or stock market under the control of any association. That all contracts for the sale of shares of the capital stock of any corporation or association, on margin or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction. A motion was made by a member from San Francisco to strike out that part which virtually stopped dealing in margins, to which Mr. Terry objected in language which was almost prophetic. The whole State had been more or less disturbed by wild speculations in stocks, money being drained from every avenue, even from the purses of

laboring men and servant girls, in their mad endeavors to become suddenly rich. Business was partially paralyzed, and every industry was lagging. In this connection Mr. Terry voiced the sentiments of the better class of people when he said:—

“The object of that provision is to place these contracts, which are, in any way you may regard them, mere gambling contracts, upon the same footing that other gambling contracts are, and let these parties take the same chances that other gamblers do. The gentleman from San Francisco objects to the phrase, ‘sales on margins.’ That term, I believe, is well understood. I suppose, perhaps, if the gentleman is himself ignorant of the term, he is the only gentleman from the city who is. A great many of them have the very best of reasons for knowing what that phrase means, and they will never forget that knowledge, because they have paid very dearly for it. Sales on margin compose the principal part of the business in these stock boards. It is the very worst species of gambling that can be indulged in. In almost any other gambling a man knows what he is going to lose. If he puts up his money on a game of faro he knows what he is going to lose; but when he buys stock on a margin he never knows where his losses are going to stop. In the language of the gentleman, ‘he is called on for more mud.’ Men do not buy stock. That is a mere pretense; the seller has no stock in his possession; the buyer don’t want any stock, and the seller knows it. . . .

“If this provision is adopted, as I think it will be, then no man can sell stock unless he has got it to sell,

because he is required to deliver the stock at the time of the sale; and whether he chooses to sell for cash or not, he must have it and deliver it when he sells. It is not a perfect remedy, but it is some remedy. Persons will not have so much object in putting up and down the price of stocks, which is simply done for the purpose of robbing the people. If these men who have been indulging in that kind of swindling had justice meted out to them in the same measure and at the same rate that it has been meted out to poorer though less guilty persons, they would have to live more than a thousand years, or cheat the State out of years of service. We propose to put some sort of check upon such operations. We propose to say that they are dealing with a man as other gamblers, and that it is at his option whether he will pay them or not; that if he objects, he can sue them and recover his money.

“It has been said that the effect of this effort will be to drive the Stock Board to Virginia City. Well, as far as I am concerned, and I think the people of the State are of the same opinion, I would be perfectly willing to see the whole business in — a climate very much farther south than Virginia City. It would be ‘good riddance to bad rubbish.’ The country would be prosperous now but for that. We have provided rises and falls in this Stock Board. Whenever the season has been prosperous some wonderful discovery of millions of ore is made in the fifteen-hundred-foot level, or the twenty-four-hundred-foot level of some mine, and a great excitement is raised and kept up until the profits arising from the wheat crop have been

stolen from the honest farmers, and then it is discovered that what was supposed to be a large body of ore was only a little bunch that did not amount to much anyhow; the mine peters out and there is nothing left of it except a few miserable persons who have lost their homesteads or their savings of years, and are driven into the almshouse or into the penitentiary in time. . . . An attempt was made last winter to try to do away with some of the evils which flow from dealing in stocks, and it is a matter of public history as far as newspapers can make history, that a bill was presented to parties in San Francisco for \$28,000, the expenses in defeating that bill in the Senate, and the bill was paid. I do not know whether it was transferred to the 'India rubber account,' or what was done with it. That was to prevent the passage of a bill regulating this traffic. Now, it is for us to protect the people against it. We cannot do it as fully as the Legislature can, but we can make these contracts void and in that way we can do away with more than one-half of the injury and loss which are inflicted upon the people by this manner of dealing."

On limiting the powers of the Legislature; on legislative apportionment; on the making appropriations and the power of the Governor to exercise his discretionary veto on objectionable items contained in the general appropriation bills; providing for the approval of amendments to the Federal constitution, and all important questions relative to the executive and legislative departments of the State government, Mr. Terry took an active interest in, and did most excellent work for the State. In discussing the revenue question, a

question upon which so many differ, and which required the best talent of the convention to adjust, Mr. Terry took a very active part. Before entering into any discussion upon the subject, the question of the taxation of mortgages, evidences of wealth and franchises came before the convention. Before he would indulge in any remarks direct, he said:—

“What the opinion of a majority of the people of this State may be, I do not know. What the people demand I do not know. I have never received any instructions in regard to what the opinion of the people may be on this subject. But I proposed to them before I came here, and I propose now to do, as far as my action and words can have any influence, what, in my opinion, will be for the best interests of the people of the whole State. When I have done that I shall have done my duty. Whether the people shall approve of the constitution after we get through with it is their business and not mine. I do not propose to stop to inquire whether it is popular or not popular. I propose to exercise my best judgment as to what is right, and I do not care whether it is popular or not

“Now, the propositions of these gentlemen seem to be two—I allude to the gentleman from Sacramento (Edgerton) and the gentleman from Yuba (Belcher)—first, that evidences of indebtedness are not property; second, that if they are property, it is impolitic to tax them. A great many people live very comfortably on this kind of property, and, if I had a few thousands of these conclusions of law, I could quit work and live very easy. And I should think if I had \$100,000 worth of bonds of the State of Cali-

fornia, or of any county in the State of California, I would consider it very tangible property. It would furnish me with food and lodging, clothing and drink, and all the necessaries and luxuries of life. If I had all these things why should I not pay taxes on them? I could change it into real estate to-morrow. I could buy land and houses and all kinds of property. It affords me a revenue greater, perhaps, than the land would afford. Why should I not pay taxes on that property as well as my neighbor, who pays upon his land and house? Why should I be allowed to invest \$100,000 in bonds and sit down and rent a house, or board at a hotel, and make no contribution whatever to the support of the government, which protects me in my personal property, while my neighbor is compelled to pay taxes on everything he has? There is no fairness, or justice, or honesty in such a proposition. The gentleman from Yuba contended that growing crops should be taxed. That while neither bonds, nor notes, nor the interest which they bear, should be taxed—"

Mr. Belcher—"I don't want them exempted."

Terry—"But he excepts taxes on bonds which produce interest—the notes that produce interest. Why, the debt grows every day by interest. The growing crop is but the interest which the land produces. Why should he insist upon taxing the interest which the land produces, and refuse to tax the interest which the note produces?"

"My friend from Sacramento [Edgerton] says that to attempt to tax indebtedness in any shape is to manufacture a nation of liars; that men are not honest

enough to tell the truth when you ask them how much they have done; and when the assessor comes round he will meet men who will perjure themselves. I do not believe that a majority of the people of this State will perjure themselves for the purpose of escaping taxation. I don't believe that, when the assessor goes to a man and asks him how many notes he has, how many solvent debts he has, for the purpose of assessing him, he is going to commit deliberate perjury. To be sure, men will sometimes do it, but I think it will be found to be the exception, and not the rule. The rule will be that true statements will be given, and the roll will be greatly increased. I think the other proposition, to deduct what a man owns from what is owing to him, would be productive of much greater abuse, and open a wider door for fraud and perjury. I think fairness and justice require that every man who owns property in this State, whose property is protected by the laws of the State, should pay his fair proportion of taxes upon the value of his property."

The tenacity with which Judge Terry clung to the principle of equal taxation, and that all persons should pay taxes upon the property which supported them, and in the possession and enjoyment of which they were protected by the State government, led to its final adoption in the face of the fact that the most eminent lawyers, who represented large banking corporations, and who were members of the convention, resisted the provision with all the ability and skill at their command. While it was the most popular side of the question in the eyes of the sand-lot element,

he knew it was right and just, and he was fearless in its advocacy. In this convention he was erecting a supporting column to the castle that contained the jewel he so highly prized, and when acting he gave no thought to this man or that, to this interest or that, in the formation of a constitutional compact between the people and the State. He seemed to have been imbued with the words of Cardinal Woolsey in his advice to Henry the VIII.: "Be just and fear not. Let all the ends thou aimest at be thy country's, thy God's, and t uth's."

An incident occurred during the session of the constitutional convention which may be related in this connection, showing that he fully appreciated the odium of dueling. Ex-Governor H. H. Haight, who had been elected a member of the convention, died, and it became the duty of the convention to elect his successor. Mr. George Peachy was presented by the friends of the dead member as their choice. Judge Terry opposed his election, and his power in the convention was absolute if insisted upon. The base of his objection was that Peachy had violated the rules of society by sustaining meretricious relations with a woman in the presence of his family for about twenty years before marrying her. It was generally understood that Terry would not accept a challenge to fight a duel from anyone, and when Peachy heard of the nature of the objection, he promptly challenged Terry. When the challenge was presented to him he smiled sarcastically and said: "Peachy knows I will not accept, or this challenge would never have been sent. I have paid the penalty of one duel, and will never

CHAPTER XXXV.

HIS LABORS IN FRAMING THE JUDICIARY SYSTEM—
RECOGNIZED AS THE LEADER OF THE CONVENTION
—HIS FAITH IN THE ADOPTION OF THE NEW
CONSTITUTION—HE RETIRES FROM THE CONVEN-
TION BOTH HONORED AND RESPECTED—A RECOG-
NIZED INTELLECTUAL FORCE.

Having had much to do with framing the several sections in the judiciary department of the constitution, being the most active member of the committee, and more fully understanding the necessary changes under the proposed new order of things, he said but little by way of discussion. He seemed to be the embodiment of an interrogation point, to whom all questions were addressed, and his answers and explanations were brief. All amendments changing the original report, except in a few cases, were promptly rejected, and the result was a very perfect judicial system under a complete reorganization and change in the judiciary department of the State government. He never clouded his ideas with sophistry. His language was so plain that no doubt was allowed to linger around his expressed sentiments. An attempt was made to prevent an appeal from a verdict in a justice's court beyond the Superior Court, as follows: "Provided, That no appeal shall be taken from any judgment in a

justice's court, in a case of forcible entry and detainer, except to the Superior Court of the same county or city and county, and the judgment of the Superior Court thereon shall be final."

In opposition to this amendment, Judge Terry made one of his best efforts, as follows:—

"This gives the plaintiff the absolute right to deprive the defendant of the right of appeal to the Supreme Court if the case is decided against him. By bringing the action before a justice of the peace, the defendant is deprived of the right of appeal to the Supreme Court. If this amendment should prevail there ought to be a further amendment to enable the defendant to transfer the case to the Superior Court, by giving a bond for costs. The only reason I have heard advanced for this amendment is that there are a large number of defendants who are without money, and that no judgment could be collected; and even the costs the plaintiff would be compelled to advance in nine cases out of ten. That may be true, but there are cases which involve very considerable interests, which would be without the jurisdiction of justices of the peace. It might include the possession of one hundred and sixty acres of land, worth \$20 an acre, and it might involve a lease upon it which has twenty years to run. I can see no reason why the parties should not be allowed to appeal. I can see no good to be accomplished by this amendment. Under the system which prevailed before 1864, in this State, these cases were commenced in the Justices' Courts, and could be appealed to the County Court, and from there to the Supreme Court. I can see no reason why

the defendant, if he is able to give bonds to secure the plaintiff, should not have the right to go to the Supreme Court and have his case reviewed."

The amendment was voted down.

When the proposition to provide two justices of the peace was before the convention, Judge Terry opposed it in one of his characteristic speeches, which is here presented in full, and although the proposition carried his arguments remain good from his standpoint, and his ideas as expressed remain correct in every particular. It was a change which the committee had thought best to make in their original report to the convention. Judge Terry said:—

"The reason which led the committee to make this change will suggest itself to everybody, or at least to those who have had any experience in watching the proceedings before justices of the peace. If justices were salaried officers I would have no objections to having a dozen in each township, as thick as telegraph poles. But justices of the peace in this State depend upon fees for their emoluments of office, and where there are two, each having jurisdiction in the same class of cases, and in the same territory, they are competing against each other, and they are almost absolutely controlled by attorneys who practice in their courts. The evil has got to that extent that in a majority of cases where there are two justices of the peace, people don't go through the form of a trial at all. The suit is brought into the Justice's Court by the attorney who owns the justice, and the defendant simply puts in an answer and lets the case go, and then takes an appeal to the County Court, where he tries it

before a salaried officer, who is not indebted to any attorney. That will always be the case where you have two justices of the peace with the same jurisdiction. They want business and will bid to get it; and in order to get it they must decide in favor of the plaintiff. I would like for some gentleman to tell me how many cases he has known where a justice of the peace decided in favor of the defendant. . . . This has been an evil of long standing, and there has been no attempt by the Legislature to correct it. The only way is to remove the temptation. If there is one man who has sole jurisdiction, he is under no obligations to anybody for bringing him business, for the business has got to come to him. But in ninety-nine cases out of one hundred, under the present system, the plaintiff gets judgment."

The writer has but one aim in view in presenting the remarks of Mr. Terry on the various questions which came up for discussion in this convention, and that is to show the practical side of the man's character. It will be observed that he never indulged in any flights of oratory, as many did. Whether in advocating or opposing a proposition, he was plain, terse, and logical, and he meant to be understood by those who seemed to have confided their cause into his keeping; and it is proper and just to say that he did not violate nor abuse his trust. His earnest, honest labors in that convention clothed him with new life and brought to him thousands of friends and admirers who had stood aloof from him in years gone by, schooled as they had been in the belief that he was a monster whose garments were dyed in the blood of

a martyr. The prejudices of the past were fading away gradually, and this service, so far removed from the plane upon which it had been notoriously standing in the minds of his fellow-citizens, and particularly that class which looked upon "Chivalry" in Terry as a menace to freedom, and who were nursing the hatred to such an extent that they opposed his being sworn in as a fellow-member, opened up to him a new field. The bitter scenes of his past life which had been caricatured in history and falsely placed in the mirror which was presented to the popular gaze by the spirit of partisan hatred and prejudice, were not so damaging to his ambition, of which he retained sufficient to guide him parallel with his inherent sense of honor. It was this sense of dignity that gave him the power to rise above the troubles that surrounded him and subdue the adverse feeling that people entertained to his discredit. Could he have died at that time his name would have been inscribed upon honor's shield and his memory would have been cherished by a grateful people.

Although the new constitution which the convention framed and presented to the people for their acceptance was not in all respects as he desired, there was enough in it that he considered an improvement on the old one to cause him to go before the people and urge its adoption. He combated the moneyed influence brought to bear to defeat it in many portions of the State, and there was not an advocate on the rostrum whose words were more generally listened to and heeded. He was as logical on the rostrum as he was on the floor of the convention, and he denounced

the opposition as enemies of the people and tools of the monopolists and the combined moneyed power; and when the constitution was adopted, he was tendered the nomination for superior judge of San Joaquin County without respect to party, which he promptly refused. He could not afford it, as it would ruin his practice, which was very extensive and brought him a revenue four times as great as the salary of superior judge. Aside from this, he had been a member of the Supreme Bench and its chief justice, and as in former times, when a lad of thirteen years, he had been a soldier in the war for Texan independence he could not sink the soldier in the schoolboy, he did not care to assume less official honors than he had worn with distinguished ability.

His labors in this convention were arduous, and the constitution made and adopted may be justly styled his handiwork. He did not go there for any display of forensic talent, but to work diligently and faithfully for the people of the State. On every page is the imprint of his genius and his practical mind. There were other eminent men in that body whose talents were highly appreciated, but they were mostly arrayed against the majority and combated the very provisions which seemed to be demanded by the people. The convention was primarily called simply to amend the old constitution, but the radical elements were determined to make a sweeping change, and they succeeded. Let the reader consult the constitutional debates as given in the minutes of that convention and he will there find that the master spirit was ex-Judge David S. Terry. He was bold in his com-

bat with the friends of the corporations who attempted to fashion an instrument by which they could evade their responsibilities to the State government and infringe upon the rights of the people. The threat that capital would leave the State and seek other fields for investment was one which he looked upon as a lever to secure their personal object.

CHAPTER XXXVI.

EFFORTS OF CAPITALISTS TO NULLIFY THE CONSTITUTION—DEFEAT OF ITS FRIENDS AT THE POLLS—TERRY DEFEATED AS A CANDIDATE FOR PRESIDENTIAL ELECTOR.

The adoption of the new constitution was a triumph for Judge Terry, but the fruits of the victory remained to be gathered in putting the wheels of government in motion under its provisions. Capitalists and corporations did not cease the warfare, although the people had accepted it by a positive majority. They saw that attacks could be made upon it through the Legislature and the courts, and to secure these they put forth their united energies. At the election of 1880 the Republicans elected the State ticket and secured the Legislature. The Workingmen were well represented in the assembly, and were led by men of ability not identified with the Kearney element, but friendly to the constitution. Judge Terry had divested himself of all party prejudices in the matter, and became the embodiment of a great commoner. His office became the nursery of aspiring statesmen who were anxious to make a good record, and the advice they received was such as to disarm them of the suspicion that he had any other ambition than to see the constitution and its important provisions put into prac-

tical operation by the most wholesome laws. He had insisted upon making it both prohibitory and mandatory in many of its important provisions, and in the absence of legislation it was self-executing, and contained the spiritual essence of life.

He was now in the full flood of well-merited popularity, and was highly esteemed for his acknowledged abilities as a man of profound thought and practical statesmanship, so much so indeed that his own party considered him a proper person to receive political honors, and, when the State convention met to select its representatives on the presidential electoral ticket, in 1880, he was chosen as one of them. He accepted the honor, and had a right to believe that time and the services which he had performed had covered the scars of former years. He had conducted himself in a manner commendable during the ten years preceding, and his popularity where he was known was conceded. At all events he proposed to test his standing in a way that would not invite personal antagonisms with any individual for place and power.

After he had received and accepted the nomination he had a conversation with Hon. B. F. Langford, State senator of San Joaquin County, and a prominent politician, with reference to his candidacy. Langford was an old and valued friend in whose judgment as a politician Terry had implicit confidence. He had made him the custodian of his property when he left the State to go South during the war, and he knew he was his friend. The conference on Terry's part was to ask his advice and ascertain his judgment in the matter, and Langford, who was outspoken and blunt, and being more of a politician than Terry, said:

"You ought not to have accepted the nomination. You know you killed Broderick in a duel, and you will be defeated."

"Yes," said Terry, "everybody knows that, but that was a long time ago, and the people understand it now much better."

"Then there's your Confederate war record," said Langford.

"Yes," said Terry; "but I will be supporting one of the bravest Union generals."

"Well," replied Langford, "you have my judgment. I know you have conducted yourself very properly for a long time, and have made many warm friends, but not in a political sense. Remember what I have said, and don't forget that a good business such as you have now must necessarily suffer during the time you spend in doing the duty you will owe to your party in accepting this position of honor without profit."

Judge Terry made several speeches during the campaign, and in one place he was interrupted by several parties in the audience who made reference to his duel with Broderick, showing that they had not forgotten that unfortunate affair. He was greeted very cordially wherever he appeared on the rostrum, and it is probably true that the incident of almost thirty years previous, which had made him notorious to many then unborn, gave him larger audiences than he otherwise would have had. There were occasions on which curiosity divided attention with his abilities. At one place in the northern portion of the State his attention was directed by a friend to a woman with three children who was telling them that he was the

man who killed Broderick. He was sitting near by at the time, and before he could speak to the woman she had taken the boys and left the audience. They had evidently attended out of mere curiosity, and that being gratified they had gone home.

The day of election came and the result was that Terry was defeated, while all the balance of the Democratic ticket was successful. The majorities were small, and he was defeated by less than fifty votes. It was generally supposed that the "blood of the martyr" was still flowing, but some credited his defeat to the presence of the Grand Army of the Republic in response to his Confederate war record. The fact that Hon. Henry Edgerton, one of Broderick's most intimate friends and supporters, defeated him, would indicate that the duel had not been condoned.

Although Judge Terry was a man who could accept defeat ordinarily with dignity and stoical indifference, he was not at all philosophical on this occasion. The idea of being selected from his associates on the ticket as the only martyr, chafed him to excess, and he gave vent to his feelings in the most forcible language when the subject was broached on several occasions. It taught him politics such as he had never known before, and he remembered the words of Langford. He had tested the sentiments of the people and it taught him that an established prejudice, correct or false, was the greatest tyrant in the world. It was strange that one in whom the people placed so much confidence as an attorney, and whose honesty and integrity as such had never been questioned or assailed, should be singled out and condemned as a politician, when

politics were demanding reform at the hands of such sterling characters as that possessed by ex-Judge Terry.

CHAPTER XXXVII.

TERRY AS A DELEGATE TO THE SAN JOSE CONVENTION IN 1882—HIS SUPPORT OF GENERAL STONEMAN FOR GOVERNOR — STONEMAN NOMINATED AND ELECTED—VIOLATES HIS PROMISE—TERRY DESERTS HIM.

In 1882 another election was to be held for State offices, and a Legislature to serve for a full term. By this time Judge Terry had become aggressive and ambitious. He did not aspire to official position. He had had all the experience he cared for in that line, but he had been studying politics. The Democrats of San Joaquin County looked upon him as a champion, and they knew he was popular with the people where he was best known. They loved his sterling honesty and independence. They knew he was equal in abilities to any man in the State, and they had implicit confidence in him. They knew he would not betray them and he was chosen as a delegate to the State convention, which was to be held at San Jose. The most prominent name mentioned as a candidate for Governor was that of George Hearst, a man of millions, without any other particular qualification for the office. While Terry had no objections to the man, he was conscientiously and constitutionally opposed to all political capitalists and members of corporations. He

believed it meant fraud and corruption at the ballot box, and he proposed to defeat him if possible. General George H. Stoneman had made an enviable record as a member of the State Board of Railroad Commissioners, and his popularity on the anti-monopoly question was universal. Terry went to the convention as the friend and special advocate of Stoneman. There were other candidates seeking the nomination, but these two were the most prominent. Hearst was backed by the San Francisco delegation and Chris. Buckley, who was called the Boss, and his nomination on the first ballot seemed imminent.

When Terry arrived with his country delegates he could find no Stoneman headquarters, and no organization. He called together a few of his friends, opened up headquarters and brought the Stoneman forces together. He ascertained that the Hearst forces were not all solid on the first ballot, and he so managed that other candidates could be kept in the field until he could control many of the floating delegates. He was industrious in his efforts to convince the country delegates that Hearst was making a "moneyed fight," and he succeeded. Stoneman was presented by the delegates from the southern portion of the State, and had a solid and unbroken support from that section. Hon. Stephen M. White, of Los Angeles, presented his name to the convention in a forcible speech, and Terry seconded his nomination. When the Hearst forces saw the enthusiasm that followed the mention of Stoneman's name, it dawned upon them that they must use vigorous means or their champion would be defeated. A few votes were taken with Hearst in the

lead, when other candidates who had not sufficient support to warrant their success, withdrew, and Stoneman received the nomination. It was Terry's fight, and he was accorded the honors.

In speaking of the skill employed by Judge Terry, one of the prominent leaders of the party and an able editor of a newspaper, said "that the work exhibited the most consummate tact and ability on the part of Judge Terry, who rallied the demoralized forces of General Stoneman and secured a victory divested of every semblance of trickery, fraud, or bombast. His labors were all performed in that dignified, open, and honorable manner which defied adverse criticism. It was simply the result of a splendid organizer of political forces."

The astonishing majority that the ticket received at that election, amounting to a political revolution, proclaimed the fact that Judge Terry was far-seeing in his estimate of the popularity of men. Stoneman, who led the ticket, received the largest majority of any candidate for Governor that had ever been elected in the State, amounting to over twenty-three thousand. It was but natural that after such a brilliant victory Judge Terry should assume some influence with the administration, and under the circumstances the Governor could do no less than admit him into his confidence. He was promised something in the dispensation of patronage. For himself he desired nothing, but he had one friend in the person of ex-Sheriff Hall, of Fresno County, for whom he asked the position of warden of San Quentin prison. The Governor, after expressing his obligations to Terry, assured him that

his request should be granted. When Paul Shirley received the appointment Terry was greatly displeased, and true to his nature and disposition, in losing confidence and trust in a man's honor and integrity, he vowed never again to cross the threshold of the Executive Chamber. By this act of perfidy Governor Stoneman lost his most valuable counselor and best friend, and as a consequence his administration was a failure.

Judge Terry had estimated the character of the man from his public record as an officer, both military and civic. He did not believe he had been swayed by corrupt influences, but he attributed it to a weakness which he did not expect to find in an old army officer who had won distinction. He knew that no man unless a coward or a knave would violate his word of honor, and this action of the Governor presented a dilemma. In speaking of this transaction with a friend who had observed that the Governor had the best of him, he said, "Yes, he is powerful in his weakness."

Judge Terry was a man who could be reached only through his convictions, and he was willing to trust men on the same basis until they proved to the contrary by their actions. In this he was generous, but his observation was keen and his judgment seldom at fault. He believed that a public office was a public trust, and would disdain to stand behind and become in any way responsible for a man who lacked the courage to do right.

CHAPTER XXXVIII.

THE NOTORIOUS STOCKTON CONVENTION OF 1884—
FIELD AS AN ASPIRANT FOR THE PRESIDENCY—
THE ANTI-MONOPOLY SENTIMENT—JUDGE TERRY'S
ESTIMATE OF FIELD'S HONESTY—STRONG LAN-
GUAGE.

The political forces were again being marshaled for a national conflict in 1884. The dissatisfied elements were crowding their sentiments before the people, demanding redress for numerous grievances, and the leaders of both the great political parties were striving to capture the vote of the workingmen who had been organized as a separate and distinct body politic. They were opposed to corporate influence and capital. The Southern Pacific Railroad Company had refused to pay its taxes for several years, as assessed under the provisions of the constitution. The State controller, who had been hoisted into power by Denis Kearney, had refused to accept a sum of money amounting to some \$900,000, which had been tendered as a partial payment of taxes to the State, from the attorney-general, under an agreed stipulation, and while this question was under discussion the Democratic State Convention assembled at Stockton for the purpose of electing delegates to the national convention, to nominate a candidate for President of the United States. The anti-monopoly sentiment had taken pos-

session of the leaders, and, with a very few exceptions, they came to that convention prepared to throw a bombshell into the camp of the corporation forces, the attorney-general and several other distinguished members of the party being the principal objects of attack.

This was to be done for the sake of policy and success at the ballot box. While the great railroad system of the State had been a grand pioneer in its material development, it had become too powerful and exacting. It had not, as people thought, meted out justice to them, and had defied the constituted authorities in bearing its share of the burdens. The cry of oppression provided politicians and demagogues with ammunition to make a warfare against it, and such men never lose an opportunity to agitate the public mind.

The names of several prominent citizens of the republic were being discussed as candidates for the presidency, and, among others, that of Hon. Stephen J. Field, who had been elevated from the position of chief justice of the Supreme Court of the State of California to that of associate justice of the Supreme Court of the United States by President Lincoln, in 1862. He was distinguished as a member of a celebrated family, whose members had exhibited wonderful and marvelous abilities in fields of public action, and for the extraordinary genius and intellectual abilities which he possessed of himself. He had become identified with California from its earliest history as a State, and had been associated with Judge Terry on the Supreme Bench for two years, and succeeded him as chief justice. The two were very intimately acquainted, and had agreed in many of their decisions.

Terry had admired Field in former years. In 1851 he was a member of the assembly from Yuba County. During his practice at the bar he had some difficulty with a judge named Turner, who had him disbarred. Turner, it seems, was a very disagreeable person, and, on account of his unfitness for the bench and his petulant nature, articles of impeachment, accompanied with the charges, were sent to Field to present to the Legislature. In presenting them, as was his duty, he made a motion that they be received, and that the judge be summoned to appear and stand trial upon the charges preferred. When he took his seat, an erratic and hot-blooded member from Tuolumne County, named Moore, took two revolvers from his pocket, cocked them, and laid them on his desk. Following this he made a speech, using the most bitter, offensive, and abusive remarks with reference to Field. The same day Field wrote a note demanding an apology, but could get no one to deliver it on account of the constitutional provision against dueling. At that time almost every member of the Legislature, and every prominent man in the State, was an aspirant for Congress, and they did not want to become ineligible by acting as parties to a duel.

In the evening he was sitting in the assembly chamber alone, and D. C. Broderick came in. He noticed Field wearing a serious countenance, and, as he approached him, he said:—

“Hello, Field, what’s the matter? You look as though you had lost all your friends.”

“So I have,” said Field, and he then related what had happened, stating that no one seemed willing to bear the challenge to Moore.

"I'll be your friend," said Broderick, "if you'll do as I advise you."

Field promised, and Broderick took the note to Moore, who refused to fight because he expected to be a candidate for Congress, but he was willing to meet Field "at any time and any place." Broderick replied that "a street fight was not just the thing among gentlemen, but, if that was the best he could do, he should be accommodated." He finally concluded to fight a duel, and named Drury P. Baldwin as his friend.

Field had been in two such scrapes before, and had exhibited such a coolness and fearlessness that his opponents backed down. Upon inquiry Moore learned that Field was a good shot, and also of his previous experience, and he concluded to go no further, of which Baldwin informed Broderick.

"Then," said Broderick, "when the assembly meets in the morning Field will arise from his seat, refer to the language used by Moore, state that he had since demanded satisfaction, that Moore had refused to respond, and thereupon denounce him as a liar and a scoundrel."

"Then Field will get shot in his seat," said Baldwin.

"In that case," remarked Broderick, "there will be others shot, too."

That night the friends of Moore told him what had occurred, and advised him to prepare an ample apology. They also informed the speaker, and he promised to recognize Moore should Field rise to speak first. But Broderick had them well in hand. He demanded the right and the privilege to dictate the

apology, and they had to accept it. When the assembly was called to order the next morning both gentlemen arose in their places, and the speaker recognized Moore, who read his apology.

Terry was present at the time in attendance upon the Supreme Court, and, upon learning the facts, forever after admired both Field and Broderick, and they were good friends until later incidents occurred which awakened in him feelings of personal revenge.

When the duel occurred between Terry and Broderick, Field, who was then a justice of the Supreme Court, was absent from the State, visiting friends in the East. In speaking of it on his return he said:—

“I was absent from the State at the time, or I should have exerted all the power I possessed, by virtue of my office, to put a stop to the duel. I would have held both the combatants to keep the peace under bonds of so large an amount as to have made them hesitate about taking further steps, and, in the meantime, I should have set all my energies to work and called others to my aid to bring about a reconciliation. I believe I should have adjusted the difficulty.”

Although not a member of the Stockton convention, which became noted for its violent denunciation of the railroad corporation and its friends, Judge Terry, for the first time in his life, became infused with the spirit that surrounded him. Always opposed to the monopoly as a political factor, yet never before manifesting any undue enthusiasm, he here uttered sentiments which astonished while they pleased those who had known him only as the calm, stubborn, and in-

flexible judge and dignified advocate at the bar. He had never before, in all his experience in California, been known to exhibit envy or malice toward any man. He had always stood above such passions in his estimate of men, and would not stoop to the level of a defamer. His was a different nature. He was as impetuous and fiery as a flash when the exigencies of the occasion demanded, and not even in the pursuit of victory at the bar had he been found guilty of scheming or plotting against any person.

In canvassing among the prominent politicians and citizens to ascertain the sentiment in regard to Justice Field, his friends met Judge Terry and sought his opinion. There has been some controversy as to the language used on that occasion, but in the conversation he used the following words: "Field is an intellectual phenomenon. He can give the most plausible reasons for a wrong decision of any person I ever knew. He was never known to decide a case against a corporation. He has always been a corporation lawyer and a corporation judge, and as such no man can be honest."

Knowing Justice Field as he did from association, and being a man of keen observation and close scrutiny in legal matters, no person can question his right to entertain the opinion he did, and at this time, having no political favors to ask of his party, and no ambition for office to gratify which would call forth envious thoughts, his expression can only be considered as the honest confession of one who had every reason to believe what he said, and the courage to say what he believed.

It may be inferred that he was professionally engaged at this time in a case that involved a vast amount of money, and that the Circuit Court of the United States, over which Field presided, had rendered a decision adverse to the interests which he represented. It would be strange indeed if Judge Terry would be more deeply interested and take more serious exceptions to an adverse decision in a case wherein a client was interested than he would in one in which he was personally concerned, and in which he was the judge to decide, as was the case in declaring the State scrip worthless when he held in his hands over \$9,000 in the same scrip. No consideration could have moved him or caused him to utter such language in the absence of personal knowledge of the character of the man. His deep perception had furnished him with the evidence, and he called the man's actions in question by the record. He was, above all men, careful in the manner in which he used his tongue. While he was careful in protecting his own honor and good name, he was equally so in defaming that of another. In his investigation of the libel suit against the *Alta-California* newspaper he had discovered something which caused him to have the case dismissed, and, whatever that may have been, he considered it of sufficient importance upon which to base a strong suspicion of corruption. The editor of that paper was the especial advocate of Justice Field's aspirations, and the nominal proprietor being the ward of Senator Sharon was sufficient to give strong coloring to his language. His emphatic remark became a matter of public importance, and the

friends of Justice Field had occasion to remember it afterwards. The consequence was that an anti-monopoly convention instructed its delegates not only unfavorable to Field, but to use every honorable effort to defeat his nomination for the presidency. This was the last time that Judge Terry ever took an active part in politics.

CHAPTER XXXIX.

JUDGE TERRY'S CHARACTER AS ESTIMATED BY HIS NEIGHBORS—OPPOSITION TO THE ENCROACH- MENTS OF WEALTH—VIEWS ON THE INROADS OF POLITICAL CORRUPTION—VIEWS ON SLAVERY.

The man who has opinions and is not afraid to express them most generally has enemies, but he also has self-respect and knows how to maintain it. After having presented so much of the life of David S. Terry, it is not necessary to impress the reader with the fact that, with all his faults, he was a strangely great man in all the elements of character that form greatness in mind, except moderation in the exercise of his passion when confronted with attacks upon his integrity or physical manhood. The biographer has to contend with many strong elements of character, every phase of which presents a novelty, in order to establish the pre-eminent one in the nature of the subject. His integrity was exceptionally individual. He had single elements of character, which alone have made other men great, but in him were combined features that were peculiarly his own, some of which were so prominent that by excessive application they became obstacles in his road to success. They were diseases that afflicted him and destroyed his hopes and aspirations in the field of political activity. The

remedies that he would apply to correct existing evils were poison to the health of political leaders who operated solely on a basis of selfishness and personal aggrandizement. He believed that truth was an inherent virtue, and did not require any special plea at the bar of public opinion to sustain its position. In this peculiar attitude he stood almost alone among the gifted minds that moved in the highway of progress. He believed in a progression that led upward and not downward, in the scale of moral and physical, as well as in the intellectual field of action. As this grand element of integrity was his main characteristic, it combined other virtues, all of which form the strong basis of uprightness in the field of human activity. His mental armament was so strong, backed by extraordinary physical force, that his energies in enforcing his views were aggressive and not popular with those who thought it more politic to conform to the demagogic conditions of things that had obtained. These were the conditions that surrounded him. A Stockton editor who had known him intimately for over twenty years, in speaking of the effort to present to the public a biography of the man, said:—

“Could a true history of Terry be written it would prove an interesting book, but owing to peculiarities of the man—his secretive nature, his dislike to converse, even with his closest friends, on matters relating to himself—renders the task of the biographer exceedingly difficult.

“No man who ever lived was less correctly understood by his casual acquaintances than was David S. Terry, and few men were ever so persistently and un-

ceasingly lied about as was he. The lying about and misrepresentation of Terry and his character were not confined to the press alone, but individuals, who knew nothing whatever about him, joined the refrain, and put themselves to great pains and trouble to repeat untrue and unreasonable tales about him. After the murder of Terry at Lathrop, editors and individuals in many instances vied with each other in circulating false stories about his career, proving to those who knew him well, that the maligners were either ignorant of the subject on which they wrote or conversed, else were brothers and cousins to the greatest liars who ever went unhung."

It is not strange, therefore, that men have suggested to the writer in connection with this work, that, without "bristles and claws," David S. Terry would be a caricature. Possibly the adjustments that have taken place in history by logical transitions consequent upon political convulsions and social evolutions in the strides to a "higher civilization," left him a lone and dreary sentinel upon the outposts of integrity and chivalry. He was weighted down with a single element of character which was shocking in its activity, and that he was not a courtier in the social world was a fault of nature. It is true that he was studded all over with bristles. They protruded from every pore, and pricked like a lance, when from his nobler pedestal he saw the infirmities of the flesh sapping the vitals of justice, and the sycophancy that cringed in the presence of wealth. While the finite and the infinite were rapidly approaching each other in the realms of science and art, the world was as rapidly receding in

its moral standard. He viewed with alarm the growing tendency among officers and aspiring politicians to barter their honor and manhood for a temporary lease of power, and his comprehensive mind viewed with precision the corruption which was gradually and surely undermining the political and social structure. Having no official ambition to gratify, he was bold and fearless in denouncing it in its attempts to usurp the places of honor. It is not strange, therefore, that he was not popular, and constantly at war with public opinion as expressed by the organs of political parties. In a conversation with the writer on a particular occasion he said: "I am ashamed of men who, when nominated for office, immediately go to San Francisco and pawn their honor, manhood, and independence for the support of the corporation and the political bosses. It is monstrous, and suggests foul corruption and possibly a bloody revolution."

On the occasion of the assembling of the Democratic State Convention in San Francisco in 1886, he was a delegate at large from San Joaquin County. The name of a prominent Democrat, who had held the position of State prison director, was being pressed for the nomination as a candidate for Governor. Terry opposed his aspirations and declared openly and vehemently that if he should be nominated he would denounce him from every rostrum in the State, as a man who had approached the Governor of the State as a pardon broker. It was his manner and custom to deal openly in denouncing men for their questionable acts, and he never ventured upon any such field of action unless he was prepared to vindicate himself from the records.

Although imperious by nature, he was the steadfast friend of the "common people," as Lincoln classed them. He stood firmly and consistently by the laboring men and the producers, and they were his best friends. His sympathies were with struggling humanity, and there is not one act of his life, official or private, that would have a tendency, in its practical application, to lead to a system of serfdom. When slavery went down, and what he considered an inferior race was freed from bondage, his ideas of human oppression ceased, but he saw arising in its stead a slavery more galling and terrible. When he beheld colossal fortunes drifting into the hands of a few individuals, and the power that was being employed to resist the execution of the laws and arrest the process of justice and the enactment of wholesome legislation for the protection of the masses, his judgment was that it was the presage of oppression, and the liberties of the people were in danger. He fought the large corporations in their greed with all the ability and power he possessed. He was not an alarmist, and would not ally himself with the rebellious sentiments that took shape among the discontented people who became frightened at the approach and menacing attitude of corporate power. He realized the situation, but he publicly combated the growing tendencies towards corruption in high places.

As an attorney and as a judge, his ideas of justice and equity indicated that he had no patience with compromises or half-and-half adjustments. What was right was right, and any adjustment where the right had to yield one iota was not right, but wrong.

While he did not claim any great superiority, being a man of modest demeanor, he was intensely radical in the advocacy of whatever his judgment arrived at. He was stubborn in will and inflexible in purpose, and these well-grounded characteristics caused him to exercise his combative powers through life. In his estimate of official duties he considered that the greater the responsibility the greater the crime in abuses, and for this reason he was liberal in his denunciation of judges and high officials who yielded to the whims of gold and brought disgrace upon their official robes—not so much that it denoted personal tergitude, as its tendency was to wrong the weak and innocent.

He was neither grasping nor avaricious. There are unwholesome waves that occasionally sweep over the country and become popular for a time in the absence of cool reflection and good judgment. David S. Terry stood aloof from them and saw the wrecks that must lie in their pathway. Such activities are called “progression,” and while they build up for a time and benefit a few, they leave poverty and distress in their wake. He was slow to assimilate with the elements in social and industrial enterprises that indicated a dissatisfaction with established conditions, and for this he was called non-progressive. There was not one thread of speculation in his system. It was all cold, calculating rhetoric with him. His accumulations of wealth all came from legitimate professional sources, and in many instances his abilities brought him large fees. His liberality was unbounded when worthy objects excited his sympathies, and no man had a larger heart or a more generous disposition.

Stoical by nature, honest in purpose, truthful in expression, and imbued with a stern and implacable will, his friendships were few, and, as a natural consequence, strong. While apparently indifferent to religious thought, he was scrupulously exact in all his moral and financial obligations. His aim, no matter in what field of action, was directed in a line parallel with a careful preservation of his good name and honorable standing among men, and he would not suffer his reputation as such to be assailed. To erect this castle was his life-work, and to guard it from successful assault he would have endured crucifixion. It was the keystone of his ambition.

It would be strange indeed if a man possessing such virtues as those just mentioned did not possess other and more surprising characteristics which awaken and produce historical interest. "The good that men do is often interred with their bones; the evil lives after them." Gauged by public opinion, this was the result of Judge Terry's existence. Whether from the hot soil of Scotch-Irish ancestry, or the school of a radical Southern chivalry, he was wonderfully equipped. The energy with which he combated human frauds amounted to audacity, and, while he was never aggressive or provoked a quarrel with anyone, he was always prepared for any emergency which might arise in resentment. With men he was usually rough and uncouth in his address, apparently careless of any social civilities, although he preserved a dignified degree of self-respect. With women he was tender, gallant, and courteous. He was moodish, and, while not intentional, he would occasionally offend his best

friends by his indifferent, brusque, and blunt manner of speech, but seldom apologized when convinced of his error. He would reason that if he became satisfied of the error the person offended should be thankful. This was the worst feature of his character. He knew that he was feared by others on account of the notoriety that had attached to his name, and he meant that those who had put the stigma upon him should have no occasion to revoke their judgment. He had killed Broderick in a duel, and he knew that society was as much to blame as he. Had he not demanded satisfaction by way of retraction or a duel, he would have been branded as a coward, and made to feel the pressure of universal contempt. 'It was the custom at the time, and the peculiar condition of society required it, as it had of others who never were subjected to the disapproval of the public. He had only resented a public assault upon his character as others had done for less serious offenses. The people had all to do in fastening upon him the reputation for violence which he was compelled to bear, and, while he bore it with dignity, he never complained until, after a long term of years, during which time he had acted the part of an exemplary citizen, and performed eminent service to the State, he had been publicly condemned at the ballot box—singled out from among his fellows of less fame, and made a criminal of in the name of a "murderer." Then he did complain.

In leaving California to unite with the Confederate forces during the Civil War, he certainly made a mistake—probably the mistake of his life—but he only did what many others had done before him who had

held high offices of honor and trust in the State government, and who have been recognized by the authorities by being placed in high positions of honor and trust. It was more honorable to engage in the front with the Confederate forces than to remain in the rear of the Union army and harass the troops by acts of treachery. Terry was a strict constructionist of the Calhoun school, and was opposed to all compromises that "settled nothing and satisfied nobody." He was for slavery because he had been associated in youth with that peculiar institution in its most aggravated form, and no doubt he considered it a patriotic duty he owed to the memory of his brave ancestors. He had probably thought that the Declaration of Independence meant something when it stated that when the government became corrupt and oppressive it was the duty of the citizens to alter or abolish it. There may be many excuses offered for this unfortunate freak, but at the time he was under a cloud which arose from the Broderick duel, and he was retreating from the false accusations that were being heaped upon him by the public. The act only "added fuel to the flame." His sense of justice was touched, and his nobler nature was seared in brooding over the great injustice that had been done him.

It was gratifying to him to know that the reputation he entertained as a "bad man" did not affect his standing as an honest one and an able attorney. He was made to realize, however, that twenty years of good conduct, incessant labor at the bar, and success as an attorney, did not rob him of the reputation he bore as the "murderer of Broderick" and the "fire-

eating Southerner," at the mention of whose name the timid shrink with fear and trembling. He was still the human volcano within whose bosom the pent-up lava lay smouldering, awaiting the eruption which could only be awakened by some event in which his honor was assailed or his chivalry called in question. His Texas relic of barbarism—the dreaded bowie knife—still sleeps in his bosom, as much a part of him as the vest he wears. It is his only arm of defense, and it must have become rusty in its sheath since the blood of Hopkins stained its blade. A pistol in his hands was only deadly because of his great nerve and utter fearlessness in the presence of death.

His eminence as an attorney was not circumscribed by any narrow limits, and his reputation as such, coupled with his fearlessness and physical prowess, attracted the attention of the attorneys engaged in one of the most celebrated cases at law that is recorded in the history of this or any other State. The two combined led to his being retained, and had he been able to foresee the ultimate consequences he might have avoided taking the step that led to such fatal results.

CHAPTER XL.

MISS HILL AND WM. SHARON—THEIR SECRET MARRIAGE—BEGINNING OF THE FAMOUS SUIT—JUDGE TERRY AS COUNSEL—THE U. S. CIRCUIT COURT—THE SUPERIOR COURT—DEATH OF MRS. TERRY—TERRY MARRIES MRS. SHARON.

Dramatic incidents are usually embellished by a woman, and no woman is capable of creating incidents of moment, involving the attention of the public, unless possessed of some extraordinary abilities or peculiar characteristics not in keeping with the usual order of her sex. The Pacific Coast has been the nursery of surprises in almost every department of life. It was here millionaires were first counted in large numbers, vast wealth supplied the sinews of war for the rebellion, and schemes of marvelous engineering surmounted obstacles in crossing the mountains and building the transatlantic railway. Society was also shocked with her characters, and the enterprise of a Meiggs and his compeers astonished the country. The clash of nationalities represented in the avenues of trade and commerce only irritated the spirit of enterprise with its cosmopolitan ideas. Among the contributions to society was a Missouri girl whose advent was noted in 1870. She came unheralded and unknown, and was only one of a thousand who had pre-

ceded her. She would probably have remained in modest obscurity had she not become infused with a spirit of speculation in an endeavor to regain a foolishly-spent fortune. At that time both sexes were wild over mining stocks, but, unfortunately for her, she was endowed with a rash and impetuous nature, backed by zeal and determination, and her faculties for scheming in the channels of the general gamble were sharply defined. In her contact with the world all her faculties were on edge. She was a woman of fair education, strong passions, and infinite resources, in the pursuit of whatever fancy took possession of her mind, and in her endeavors to obtain wealth in the field of speculation she became acquainted with Hon. Wm. Sharon, then United States senator from the State of Nevada, who was a wealthy banker and controlled vast mining interests. Their social intimacy and business relations, whether honorable or not, led to the most startling results.

The following brief mention of the lady is taken from what is said to be a correct history of her former life in Missouri, and as its correctness has never been challenged, it is here presented without comment:—

“Sarah Althea Hill was born near the town of Cape Girardeau, Missouri, in 1848. She comes of good stock, her father being Samuel Hill, a prominent attorney, and her mother Julia Sloan, the daughter of a wealthy lumber dealer. She has one brother, Hiram Morgan Hill. Her parents died in 1854, leaving the two orphans an estate valued at \$40,000. Sarah is related to some of the best families in the country.

“She attended school at Danville, Kentucky, and

finally graduated from St. Vincent Convent, Cape Girardeau, Missouri. She had a governess in the person of a Mrs. Barrall, a sister of ex-Congressman Hatcher. Her grandfather, Hiram Sloan, was her guardian, and appears to have held a slack rein.

"The young woman developed a spirited temper, and soon after reaching legal age made her money fly. She grew up into womanhood in much her own way, and was noted for her beauty and temper. She was a schemer above all things, and this made her unpopular among her girl companions. It was said of her, too, that, though she was a spendthrift, she worshiped money, and gave her attention mostly to those who possessed it. She is remembered by her friends here as something of a flirt, and at one time is said to have had three engagements to marry on her hands. One of the parties is now a prominent politician in southeastern Missouri, and another resides in St. Louis.

"Her conquests were numerous during the time she held sway. She was fast, but her name was never tarnished with scandal. In love affairs Sarah was tyrannical and more than one of her lovers had to suffer her iron rule and eccentric whims.

"It is said that she really loved one young fellow, named Will Shaw. They were engaged to be married, but as the result of a tiff the young man determined to break the engagement. Sarah heard of this and when next he called she was so charming that he pressed his suit with more ardor than ever, when she had her revenge by snubbing him.

"The story goes that she really wanted and expected

him to return, but he did not, and in September, 1870, disgusted and broken-hearted, with only the shadow of her fortune, she started for California.

"A young uncle named William Sloan accompanied her to the coast. He was wealthy and took his niece to his mother's home. Sarah and the old lady did not live in harmony, and Sloan gave the girl a fine suite of rooms in a hotel. It is there that she met Senator Sharon."

Ten years after her advent into California, she claimed to have been married to William Sharon by civil contract, a copy of which she had in her possession, dated August 25, 1880. This contract was withheld from the public under pledge of secrecy for two years, and during that time, while absent from San Francisco attending to his official duties at Washington City or on business in Nevada, he had written her letters, some of which purported to have been addressed to his "dear wife." After the expiration of the time indicated, the existence of the contract was made public, and on October 3, 1883, Sharon, denying having entered into any such contract, brought an action in the United States Circuit Court to declare the contract fraudulent and a forgery, together with the alleged "dear wife" letters. While these proceedings were in progress in the Circuit Court, Sarah Althea, in the name of Mrs. Sharon, brought suit for divorce, in January, 1884, in the Superior Court of San Francisco, alleging adultery and desertion. The former allegation was afterwards withdrawn, and the case immediately attracted universal attention from the fact that Sharon was a man of

prominence and possessed of great wealth, being more than ten times a millionaire.

David S. Terry was called as counsel in the case soon after it was instituted in the Superior Court, and was assigned the position of special counsel and protector to the plaintiff, as there were intimations based upon well-grounded suspicions that she was in danger of being kidnapped or "spirited" away by intrigue and through the use of money, which was being lavishly expended to defeat her cause. Terry's position as adviser and protector in connection with this report gave strong emphasis to the prevailing sentiment in the public mind that her cause was a just one. At all events, his presence with her, enjoying the reputation which he did, was sufficient protection.

After Judge Terry had been retained in this position, a prominent attorney of Los Angeles was approached by the opposite side and offered a large fee if he would become an attorney in the case. This gentleman, who now holds an honorable position in the State government, possessed a reputation for fearlessness equal to that of Judge Terry, and was a man of acknowledged integrity and eminent legal abilities. The offer was a flattering one, but when he was made aware of the part he would be required to perform, he promptly declined having anything to do with it. The fact that they feared Judge Terry and that he stood in the way of accomplishing their designs, suggested his removal in some manner. This gentleman, like Judge Terry, had a reputation for rashness thrust upon him, and, like Terry, his sense of honor and integrity was too great to suffer him to accept a position

at any price where questionable proceedings were demanded or expected. Sharon did not have enough money to buy him. True to his honor as an attorney and gentleman, this incident was never made public until after Terry's death.

In his practice, Judge Terry had always been scrupulously careful in engaging in cases of equity. He would have nothing to do with cases of questionable honor on the part of litigants, and this was the reputation he bore wherever he was known. In becoming the chief counselor of Mrs. Sharon in her suit for divorce, he believed her cause was just, and his connection with the case as such had the effect of more firmly convincing the people that she was the subject of persecution, and their sympathies were with her. When he first became associated with the other attorneys in the case, he found she had brought an action for damages in the sum of \$50,000 against a newspaper for certain publications which stigmatized the alleged marriage contract and letters as forgeries, and he had the suit promptly dismissed. He knew these documents would have to be submitted to expert tests before the judicial tribunals where proceedings were being had, and that was sufficient. When the demand was made by the Circuit Court, he advised their surrender, but she stubbornly refused to produce them, and was sentenced to imprisonment in the county jail for twenty-four hours for contempt.

Judge Terry denied that the Federal courts had jurisdiction, and made a motion for a stay of proceedings and to prevent Senator Sharon from bringing and prosecuting a suit in the Circuit Court. Judge

Sawyer denied the motion. The documents were now in the hands of Judge Terry, and in obedience to the mandate of the court, he submitted the alleged contract and "dear wife" letters to a test as to their genuineness before Commissioner Houghton. These proceedings proved nothing substantial beyond the fact that the signature to the contract was genuine; but the court decided that they were fraudulent and forgeries and ordered them surrendered for cancellation and to be destroyed. Sarah Althea refused to obey the order of the court, and, to avoid process, absented herself and remained in seclusion at Stockton, where Terry had sent her, for several days.

In the meantime, and before the Circuit Court of the United States had taken final action, the suit for divorce was being hotly contested in the Superior Court of San Francisco, before Judge Sullivan. There was as brilliant an array of legal talent as money could procure on the part of the defense, while those on the part of the plaintiff were bold and aggressive. In this court Judge Terry did not appear, but those who did relied upon a verdict in their favor for compensation, and they prosecuted it with an earnestness, stubbornness, and vigor never before witnessed in any court on the Pacific Coast. The trial of the case occupied the attention of the Superior Court for eighty-three days, and resulted in a decision in her favor, and a decree of divorce being granted. It established the validity of the marriage contract, granting her one-half of the community property, awarded her \$2,500 per month alimony and \$55,000 for counsel fees.

A motion for a new trial was denied by the Superior Court, and an appeal was taken to the Supreme Court from the judgment, and also from the order awarding alimony and counsel fees. In its decision in the case the Supreme Court reduced the amount of alimony to \$500 and denied the award for counsel fees entirely. The opinion was written by Justice McKinstry, and concurred in by Searles, Temple, and Paterson. It recognized the validity of the contract and asserted that marriage by contract, whether secret or public, was valid in this State. The two appeals were both considered in this decision. This action of the Supreme Court was had in January 1888. That year the *personnel* of the court was changed, and another appeal was taken on the findings on evidence, relating more particularly to the genuineness of the declaration of marriage, and the court reviewed the previous decision, and reversed its own judgment. In other words, it declared that the facts presented in evidence before the Superior, or trial court, did not justify the findings and decree, and a new trial was ordered. Justice Works delivered the opinion of the court.

Judge Terry was present when the decision was rendered, and he walked out of the court room the most astonished attorney and ex-judge imaginable. It was a freak in jurisprudence that had but one meaning. When he went to his rooms at the hotel he met an old-time friend in the corridors and said:—

“Well, S——, they have salted me.”

“What do you mean, judge?” inquired S——.

“The Supreme Court has reversed its own decision in the Sharon case, and made my wife out a strumpet.”

"What are you going to do about it, judge?" asked S——.

"What can a person do in the face of Sharon's millions? It is infamous! What is the world coming to, anyway? Here, only a few weeks ago, Senators Stanford and Stewart voted to confirm the nomination of Lazaar as an associate justice of the Supreme Court of the United States, when they must have known, as I know, that he is totally incompetent for the position. The corporations and capitalists are centralizing their power in all departments of the government, both Federal and State. Justice has a dark outlook."

Judge Terry made a motion for a rehearing on the ground that the Supreme Court could not disturb its own decisions after having been once rendered and after having become the law of a case. The arguments which he prepared in support of this motion will be referred to at the proper time.

In the meantime, the United States Circuit Court rendered a decision on the question of the validity of the marriage contract, declaring it a forgery and denouncing it in the most vigorous language. The decree was entered January 15, 1886, ordering the surrender of the document for cancellation, and granting a perpetual injunction against the respondent. The decree also enjoined Sarah Althea, her agents and attorneys, from alleging the genuineness of the document in evidence, or otherwise, to support any claim or set up any right or interest of any kind whatever.

The question of jurisdiction being denied, the action of the United States Court was held in abeyance, but

it had a strong bearing upon the action of the State Courts, and the case was permitted to rest until the presiding justice of the Ninth Circuit of the United States Court would sit and determine the question of jurisdiction, and put the decree into execution.

Judge Terry's first wife died during the time he was engaged in this celebrated legal controversy. It was a severe blow to him, for she had been both wife, counselor, and friend. She understood his disposition as no other person could, and she knew how to administer to his peculiar nature. It has been observed by those most intimate with them, that no home could be more pleasant and no family more happy during her lifetime. Although overbearing and blunt in his disposition in contact with the world, he was a kind husband and father. The bereavement left a void in his heart, for no matter what the storms without in elbowing his way through the world, he loved and cherished the comfort and rest of domestic life. In his relation with his client in this case he had become attached to her. He firmly believed her cause was just, and that she was villainously persecuted with gold. With his cool, calm, and judicial mind it would be strange, indeed, if he did not see more deeply and clearly than those who were but superficial observers. He recognized the fact that she was a woman of talent and possessed a strong will and unyielding determination. Her rare qualities impressed him so deeply that he was blind to the subtle influences she employed in order to gain his confidence. She needed a companion and friend to stand by her in the prosecution of her schemes. He was charmed by her audacity and her

native brilliancy, and remarked to a friend who was chiding him for falling in love with his client, that she was the "smartest woman he ever saw." Whether true or false, she had led him to believe she was a persecuted woman, and that Sharon's millions were being employed to defame her character and destroy her reputation. She had studied his nature and secured his sympathies and love—for Terry adored her, and on the seventh day of January, 1886, they were married at the Catholic parsonage in Stockton. He married her as the legally divorced wife of Senator William Sharon, and such she was, as the only court of competent jurisdiction in such matters had so decreed, and if based upon false premises, even the Supreme Court had failed to determine the fact. Its later decision could only be looked upon with grave suspicion.

At this time Judge Terry occupied a position at the head of the profession in the State, and had offices in San Francisco, Stockton, and Fresno. His home office was at Stockton, but for several years his practice was so extensive that he resided almost constantly at San Francisco. His financial success had induced him to invest largely in real estate in Fresno County, and he became interested in a mine in Arizona. All of this property was more or less encumbered, but with the prospects before him, he was considered in comfortable circumstances.

After his marriage with Sarah Althea his social relations were seriously disturbed. The proceedings in court had developed such a state of facts in connection with her relations with Sharon, many of which were either acknowledged or not controverted, that a noto-

riety attached to her that presented a coloring of suspicion people were not willing to condone, although Judge Terry had accepted them as legitimate in making her his wife. It was not because they had lost confidence in him as an honorable man or as one who had sufficient knowledge of her chastity, but the social avenues that had been open to his former wife were closed to her, and his manly spirit was stung to the quick. Having given her the dignity of his name, he was not the man to desert her or to allow anyone to invade his home with other than the highest respect and consideration for his wife. If the verdict of a court around which suspicion rested had become the verdict of the people in respect to her honor and chastity, he could not help it. His knowledge of the affair, and his knowledge of people and their frailties in the presence of that power to which so many kneel, was altogether different. But this he realized, that the strong citadel which he had erected as a monument to his unflinching integrity was not a castle to protect him from the enemies of his domestic happiness. His proud fortress was being dismantled by a friendly enemy. Personally he would not have chafed under the pressure of such conditions, for as a recluse he would have been contented; but another's happiness and reputation was involved, and that one he had chosen as his wife.

Like some majestic oak, whose huge trunk and rugged arms have defied the winds, the storms, and the fury of the hurricane for centuries, the twining tendrils of the deadly ivy, with loving embrace, were quietly and insidiously undermining his strength and

destroying his vital energies. Age had left no visible marks of its displeasure upon him, no warning of approaching decay; his majestic form was still erect, and he stood among his fellows a splendid specimen of physical manhood, with intellectual powers full fledged; but the hour of greatest trial was approaching slowly but surely, and he was in the breach. Samson had his Delilah.

CHAPTER XLI.

THE FINAL DECISION IN THE SHARON VS. SHARON CASE—MEMORABLE SCENE IN COURT—JUDGE TERRY LOSES HIS TEMPER—ARRESTED AND IMPRISONED FOR CONTEMPT—APPEAL FOR RELEASE DENIED.

The death of Senator Sharon, which occurred in 1885, made it necessary for his attorneys to substitute his legal representatives as parties to the actions not yet disposed of by the Circuit Court of the United States. Accordingly, to be properly joined, Francis G. Newlands, son-in-law of Sharon, and executor of the estate, was substituted as defendant in suit against Sharon, and Frederick W. Sharon as plaintiff in a suit entitled "A bill of revivor in equity" against Sarah Althea Hill, and "F. G. Newlands *vs.* Sarah Althea Terry and David S. Terry, in a suit in equity in the nature of a bill of revivor and supplement and to carry decree into execution." Demurrers were entered in all three cases by Judge Terry.

Justice Stephen J. Field, of the United States Supreme Court, was present and presided on the third day of September, 1888, at which time the cases were to be heard and finally disposed of. A few moments before the court opened the Terrys, as defendants, entered the court room and took their seats within the

bar at a table near the clerk's desk, and in front of the judges. There was a crowd of eminent attorneys and distinguished people present, as though they had been invited to witness some extraordinary proceeding. The case had become so notorious, and had occupied the attention of the courts for so long a time, that no doubt there was a curiosity to witness the end, which now seemed imminent. From the bench on which sat Justice Field and Judges Sawyer and Hoffman, to the door, guarded by a deputy marshal, the room was packed. About the tables sat the attorneys for each contestant. Judge Terry and his wife and their attorney, ex-Judge Stanley, sat together. To all appearances Mrs. Terry was the most composed and coolest person present. Occupying a seat near by her sat Marshal Franks. Judge Field commenced reading the decision, and while doing so Judge Hoffman sat with his legs crossed, an apparently disinterested spectator, Judge Sawyer sat with his eyes half closed, and his face was as expressionless as the desk before him. It was understood that the decision was only to revive and put in practical force the former decision of the Circuit Court, and against Mrs. Terry, but for fully ten minutes she sat and listened without any excitement or apparent interest to the low-toned drawl of Justice Field. In rendering judgment he said:—

“The demurrers in both cases are overruled; that in the first case, the original case of William Sharon against Sarah Althea Hill, now Sarah Althea Terry, the proceedings and final decree therein stand revived in the name of Frederick W. Sharon, as executor, and against Sarah Althea Terry and David S. Terry,

her husband, the said executor being substituted as plaintiff in the place of William Sharon, deceased, and the said David S. Terry being joined as defendant with his wife, so as to give to the said plaintiff, executor as aforesaid, the full benefits, rights and protection of said final decree, and full power to enforce the same against the said defendants at all times and at all places and in all particulars."

Justice Field, in his opinion, said: "If the contract was genuine and valid it placed her in a position to claim her rights to a portion of the community property. It would also give her an inchoate right to dower in the real property, which he then possessed in the District of Columbia, amounting in value to \$300,000. Such right in the real property of Sharon in the District of Columbia would greatly exceed in value the amount required to give jurisdiction to this court."

After having disposed of the objections to the jurisdiction of the Circuit Court in the original suit, the court proceeded to consider how far the judgment thereon was affected by the decision of the State Court, and held that "the jurisdiction of the District Court of the United States and the right of the plaintiff to prosecute his suit in that court having attached, that right could not be arrested or taken away by any proceedings in another court."

In closing Justice Field held that the failure to present the decree of the Circuit Court to the State Courts did not lessen its efficacy, and would not prevent it, when revived, from being hereafter presented to them, and does not impair in any respect the power of the Federal Court to enforce its execution.

After having stated the case fully he approached that part of the decision which referred to the marriage contract, in the following language:—

“The original decree is not self-executing in all its parts; it may be questioned whether any steps could be taken for its enforcement until it was revived. But if this were otherwise, the surrender for cancellation of the alleged marriage contract as ordered, requires affirmative action on the part of the defendant. The relief granted is not complete until such surrender is made. When the decree pronounced the instrument a forgery, not only had the plaintiff the right that it should be thus put out of the way of being used in the future to his harassment and the embarrassment of his estate, but public justice requires that it should be formally canceled, that it might constantly bear on its face the evidence of its bad character whenever and wherever presented or appealed to.”

At this juncture Mrs. Terry arose hurriedly and precipitated the most remarkable scene that was ever witnessed in a court room. She had lost none of her self-possession, as she pointed toward Justice Field before speaking, and in a voice not at all tragic or excited, but distinct and deliberate, said:—

“Judge Field, are you going to take it upon yourself to order me to give up that contract?”

At this disturbance of the court the crowd became interested and pressed forward. For an instant Field was disconcerted at the audacity of the woman, but in a moment he spoke in the same tone in which he had been reading, and said, “Sit down, madam.”

She was about to speak again when she was inter-

rupted by Judge Terry, who asked her to sit down, but she was irrepressible, and in a tone somewhat louder, and without heeding her husband, she said :—

“Judge Field, we hear you are bought. We want to know if it is true, and how much you have been paid by the Sharon people?”

The judge spoke very quietly, and said, “Marshal, put that woman out.”

Terry sat between his wife and the marshal, and as the latter stepped forward to obey the order and was about to lay his hands upon Mrs. Terry, who was still standing, she said in still louder voice :—

“It appears that no one can get justice in this court without he has a sack.”

Again the order came from the court to take her out, and as the marshal caught her by the arm, Judge Terry arose and said, “Don’t touch her. She is my wife, and I will take her out of the court room.”

Marshal Franks, instead of allowing Terry to take her from the room, caught him by the lapels of the coat and thrust him against the chair, saying, “I know my duty, sir.” Terry was on his feet in an instant and he drew his fist and struck the marshal a blow in the mouth which struck his teeth, inflicting a wound on his own hand. Immediately a dozen men sprang on Terry and bore him to the floor. With the strength and art of a trained wrestler he squirmed and fought in his rage, and the officers had no easy task to hold him. Mrs. Terry was struggling with two or three officers, who finally took her out and placed her in a room adjoining the marshal’s office. Before leaving the room she handed a man her satchel, saying that there was money in it.

Judge Terry soon gained command of his temper and said to the officers, "Let me go. I only want to accompany my wife, and I will go quietly." He was released and the officers fell back. Without a word he walked to the door and half the people in the court room followed him, and Justice Field, after taking a drink of water, continued his reading. His companions on the bench did not change their positions.

As Judge Terry crossed the corridor to the marshal's office he found the door barred by an officer. This enraged him, and he took from his vest his Texas knife and demanded that he be allowed to go to his wife. One of the officers drew a pistol and said, "Don't use that or I'll shoot." Terry grasped his knife firmly and ordered them to stand back, as he was going to his wife and no man could stop him.

At this Marshal Franks spoke and said, "If he will give up his knife he may go." Terry said, "Certainly," and handed his knife to a deputy marshal, and passed into the room where his wife was.

The man who received the reticule from Mrs. Terry did not care to give it up, but it was taken from him. In it was a forty-one caliber revolver. One chamber was empty, the trigger resting there. This weapon, with Judge Terry's toothpick, was put in the safe.

During the fight in the corridor and office Justice Field continued reading the decision, and then the court adjourned, the few spectators to talk over the exciting scene, and the judges to take counsel how best to punish the Terrys for their contempt of court.

The above was related to the writer by a gentleman who was an observer of the transaction from first to

last, and who was present for the express purpose of observing how the Terrys would take the decision which he knew in all reason would be given, but was totally unprepared for such a scene as transpired. While he believes he was as cool as a majority of those present, he would not say that he would have been willing to testify that the moon was not made of green cheese at the particular moment, as the whole transaction did not occupy over five minutes from the time Mrs. Terry first interrupted the court until Terry was with her in the room near the marshal's office. The excitement was intense, so intense, indeed, that one of the reporters of a San Francisco newspaper was on the street willing to swear that Mrs. Terry fired a shot. Of course that would have been perjury, but he would have sworn to it all the same. Five minutes after the affair the general rumor on the street was that Field had been killed by Mrs. Terry, and that Terry had shot the marshal. No one was in a condition to know exactly what had occurred.

After he had been admitted to the room in which his wife had been placed, an order came from the court instructing the marshal to hold them both as prisoners until further orders, and after the judges had consulted, the following was placed in the hands of the marshal for immediate execution:—

“In the Circuit Court of the United States of America for the Northern District of California.

“In the matter of contempt of David S. Terry. In open court.

“Whereas, on this third day of September, 1888, in open court and in the presence of the judges thereof,

to wit: Hon. Stephen J. Field, circuit judge, presiding, Hon. Lorenzo Sawyer, circuit judge, and Hon. George M. Sabin, district judge, during the session of said court, and while said court was engaged in its regular business, hearing and determining cases pending before it, one Sarah Althea Terry was guilty of misdemeanor in the presence and hearing of said court; and, whereas, said court thereupon duly and lawfully ordered the United States marshal, J. C. Franks, who was then present, to remove the said Sarah Althea Terry from the court room; and whereas, the said United States marshal then and there attempted to enforce said order, and then and there was resisted by one David S. Terry, an attorney of this court, who, while the said marshal was attempting to execute said orders in the presence of the court, assaulted the said United States marshal and then and there beat the said marshal, and then and there wrongfully and unlawfully assaulted the said marshal with a deadly weapon, with intent to obstruct the administration of justice and to resist such United States marshal and the execution of said order, and, whereas, the said David S. Terry was guilty of a contempt of this court by misbehavior in its presence and by a forcible resistance in the presence of the court to a lawful order thereof in the manner aforesaid:—

“Now, therefore, be it ordered and adjudged by this court, that the said David S. Terry, by reason of said acts, was and is guilty of contempt of the authority of this court, committed in its presence on this third day of September, 1888. And it is further ordered that said David S. Terry be punished for said contempt by imprisonment for the term of six months. And it is further ordered that this judgment be executed by imprisonment of the said David S. Terry in the county jail of the County of Alameda, State of California,

until the further order of this court, but not to exceed said term of six months. And it is further ordered that a certified copy of this order under the seal of this court be process and warrant for the execution of this order."

Without a break in his tone, the justice took up the order in the case of Sarah Althea Terry. It was as follows:—

"Whereas, on the third day of September, 1888, in open court, and in the presence of the judges thereof, to wit: Hon. Stephen J. Field, circuit justice, presiding, Hon. Lorenzo Sawyer, circuit judge, and Hon. George M. Sabin, district judge, during the session of said court, and while said court was engaged in its regular business, hearing and determining causes pending before it, said Sarah Althea Terry interrupted the proceedings of said court by loud and boisterous language, and was thereupon ordered by said court to be silent and to take her seat, and refused to do so, but continued to use boisterous and insulting language, and asked the presiding justice 'how much he was paid for his opinion;' and then and there used toward the court in its presence other contemptuous and scandalous language;

"Whereas, the said court did then and there make an order that the said United States marshal remove the said Sarah Althea Terry from the court room, which order the said marshal did then and there attempt to execute, and which said order made in her presence and hearing the said Sarah Althea Terry resisted in the presence of the court."

It was then ordered that Sarah Althea Terry be punished for said contempt by imprisonment in Alameda County Jail for thirty days.

For a man of Terry's disposition and sense of justice, this was probably the strongest appeal to his irritable temper that was ever made. His chivalry was touched and also his honor when his word was questioned by the marshal. Those who know him best are ready to testify that he would imperil his life in defense of a friend, and how much more that of the one he had made his wife? During his long practice at the bar he had always sustained a high reputation for respect and courtesy toward courts of justice, and in their presence exhibited a dignity worthy of emulation, but here was a case which, from the peculiar nature of the surroundings, demanded the exercise of a temper which he did not possess. When he gave his word that he would remove his wife from the court room he intended to do so, which would have prevented the disgraceful scene which followed. The marshal was under orders to perform a duty, and while he would have avoided a conflict with Terry had he known him better, he must not be censured for carrying out the orders of the court. It was not the true and dignified character of the man that confronted him at that exciting moment; it was his notoriety for rashness which was always aggravated by the timid and prejudiced. The climax was hastened by the marshal and by Mrs. Terry in her persistent assault upon the honor of the court and judge. Terry was always equal to the necessities of a climax when he was in the breach.

✧ In obedience to the judgment and order of the court, Judge and Mrs. Terry were taken to Oakland and placed in the Alameda County Jail without re-

sistance. Terry was well aware of the fact that contempt had been committed, but he said that the scene which had transpired was but a faint expression of the contempt which he entertained for the court. While in jail he was visited by friends from all parts of the State, who knew him to be a cool and truthful man, and one too brave and honorable to seek cowardly refuge behind a falsehood. Imprisonment was nothing to him in comparison with the vindictiveness exhibited in the six months' sentence. He knew it was an outrage and unprecedented, but he knew his man. He remembered a time long ago, when associated with Judge Field on the Supreme Bench. The reminiscence here given is a bit of history published at the time Terry was in jail, and is abundantly vouched for. The incident occurred in 1858, when Terry was chief justice and Field and Baldwin were associate justices of the Supreme Court.

Field was a New Yorker, and as he mixed a great deal with Southern gentlemen, who did not hold the valor of the North in high esteem, he was always particularly anxious to pass for a man of courage. Like all men who are not quite certain of their courage, he was at some pains to let the world know that he was an extra brave man. One of his ways of showing this was by constantly associating with men who had special reputation for bravery, and among them was Judge Terry, whose society he cultivated assiduously and on whom he constantly leaned for advice in both legal and personal affairs.

One day there was a fearful scene in the Supreme Court. The reporter of the court was a man named

Lee, who had come to this State from Illinois, and was regarded as a man who, while brave and reckless, was otherwise dignified and gentlemanly. Charles Fairfax was clerk of the Supreme Court, and a bill was pending in the Legislature at the time to create the office of Supreme Court reporter, to which position Lee, who was then acting as such, aspired. Some discussion arose in regard to the bill and Lee made some remark which irritated Fairfax and he slapped Lee in the face. Fairfax was unarmed, but Lee seized his sword cane and, drawing the slender blade, plunged it into Fairfax's body, and then deliberately twisted it around. A bystander handed Fairfax a pistol. Fairfax took the pistol and pointed it at Lee. He was about to shoot, but through the pain of his wound and the natural desire for vengeance there came his great charity and nobility of soul to stay his hand, and, lowering the pistol, he said: "Lee, you have wounded me to death in a cowardly way, and I ought to take your life. But your wife and babies have done me no wrong, and I spare you for their sake."

Then he sank to the floor with a groan and became insensible. The bystanders picked him up, placed him on a bench instead of a stretcher, and bore him to his home. It was late in the afternoon, and there at the gate of the cottage stood Mrs. Fairfax, waiting her husband's return. It was Judge Field who broke the news of the crime to her, and it was Judge Field who wrung her hand in sympathy and vowed that the cowardly assassin should be brought to justice.

Then Judge Field went out among the people of Sacramento and roused them against the cowardly

crime of Lee. He said that Lee was a villain who should be hanged, and more than that he was a scoundrel who would have been put in jail long before but for Field's intervention. All this came to Lee's ears and he determined to stop Judge Field's mouth. So he wrote Field a letter saying that unless he retracted all that he had said about him he would whip him on sight. Field was very much agitated at such a threat from such a man, and went to his friend Baldwin for advice, as Judge Terry, on whom he relied, was out of town. Baldwin said, "That fellow Lee will assault you and perhaps kill you if you don't retract, and perhaps you had better satisfy him." This must have been in consonance with Field's wishes, for he at once sat down and wrote an ample retraction and sent it to Lee. Lee having got the measure of his man, proceeded to rub it in by causing an account of the circumstance to be printed in a public newspaper and with it the Field letter of retraction. It was published in a newspaper called the *Age*, since rechristened the *Bee*, and naturally Field's backdown became the talk of the town. The day it was published Terry came back to town and he saw Mrs. Fairfax and heard from her what Field had promised to do. Then he went to his chambers, and the first thing he saw was the *Age* containing the copy of Field's retraction. Soon Field entered, and handing him the paper Terry said, "Judge, is this true?" Field seized the paper and read the item. Then his face turned livid with shame and rage, and he dashed the paper at Baldwin, who was there, crying out: "See what you have made me do, Baldwin; see what

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CHAPTER XLII.

JUDGE TERRY IN JAIL—LOSES CONTROL OF HIS TEMPER AND BECOMES A VIOLENT DECLAIMER—HIS VERSION OF THE COURT SCENE—THREATS OF ASSAULT IN RETALIATION—PETITION FOR RELEASE—PETITION DENIED.

For a second time David S. Terry became a prisoner on account of his irritable and uncontrollable temper. The following day he was visited by a reporter of the *Stockton Mail*, whose editor was his particular friend and admirer. As the various reports of the disturbance in the court room were so conflicting that no reliance could be placed upon any one of them, and even the details set forth in the order of the court were not vouched for by any respectable eyewitness, the transactions, as related by Judge Terry to this reporter, are probably as nearly correct as any could be under the circumstances. Following is his statement, and as he was probably as conscious of the proceedings as any man in the court room at the time, his version is entitled to some weight:—

“I made no resistance to any order, and the record is a lie. I was sitting down when my wife interrupted Judge Field, and when he said, ‘Marshal, remove that woman from the court room,’ I rose to take her

out. As the marshal came towards me I said, 'Don't touch her. I will take her out of the court room.' Marshal Franks yelled out, 'I know my business,' and grabbing me by the lapels of the coat tried to force me back into a chair. Two others seized me by the shoulders and forced me down. Again I said, 'I will take her out.' The men who were bending me back hurt me, and I wrenched myself free and struck at Franks, the blow hitting him in the mouth. I struck at him because he assaulted me without any right or order of court. By that time they had dragged Mrs. Terry out of the court room. Then their duty ended. They had obeyed the order brutally. The order was to take her out of the court room, and she had been taken out. But that was not enough. They dragged her to a room and shut the door. I heard her scream and went to her. I was a free man and she legally a free woman, and I had a right to be by her side. They had no order to lock her up or keep me from her. But they barred the door, and to scare them away I drew my knife. I told them I did not want to hurt any of them, but they pulled their pistols. I could have killed half a dozen of them if I had wanted to. Two of them had pistols pointed at me. Someone said, 'Let him in if he will give up his knife.' I said, 'Certainly,' and gave up my knife. They did not take it from me. One of them, a man named Taggart, said in my presence that he would have shot me if I had not stopped. I told him that he would not dare to shoot me, and that if he wanted to shoot he would have a chance. Then he said he did not want to have any trouble with me,

and I told him not to brag after it was all over about what he would have done. The fact is, the court was frightened of something, and had the room full of deputies and fighters of all kinds who wanted a chance to make a showing of bravery, and after it was all over Judge Field lied in the record. I want to get him on the witness stand to repeat his story, and then we will see if there is any law against perjury."

During his term of imprisonment in the Alameda County Jail his manner was completely changed. He yielded to his impetuous nature by giving voice to expressions that astonished his most intimate friends. The man of historic and proverbial reticence became the most violent declaimer, and the public press took up the utterances and sent them abroad clothed in all the garments that the ingenuity of reporters and editors knew how to dress them to produce the most sensational effect. The coloring given to them by a few of the unwise editors, which only inspired a more lasting hatred, made them still more potent to arouse the greatest anxiety. One newspaper, the San Francisco *Examiner*, which was not friendly towards Justice Field, made the astonishing and unguarded announcement that, from his past character, it would be folly to suppose that Judge Terry would permit such an act of humiliation to go unavenged.

J. H. O'Brien, of Stockton, an old-time friend, visited Terry in the Alameda Jail on one occasion, and in a conversation Terry said:—

"When I get out of jail I will horsewhip Judge Field. He won't dare to come back to California, but the earth is not big enough to hide him from me."

O'Brien advised him not to assault Judge Field in any way, as the assault would surely be resented.

"If he resents it," said Terry, "I'll kill him."

Mrs. Terry, who was present, said, "No, don't kill him, judge: just horsewhip him."

This conversation, which undoubtedly took place, became public property, and many others, some true and many false, were sent East, and became known to the authorities at Washington, and, coupled with the reputation which had attached to his name in former days for violent acts, gave alarm for the safety of Judge Field.

To one friend who had visited him on business, Judge Terry said: "In all the annals of jurisprudence and history of cases of contempt this is the most outrageous. Justice does not demand it. The punishment inflicted is not corporeal. It is not intended to be such. Ten days is just as severe as six months or a year. The offense is not a crime in the eyes of the law; it is in the nature of discipline, like incarcerating a soldier for disobedience. Judge Field views it from a different light. He is a monstrous coward, and he safely measures the time he will be detained on this coast holding court. He meant that I should remain in prison until he had returned East, knowing that he deserved punishment, and fearing that I would mete out the punishment he deserved."

The spectacle of a man of so much prominence, of so much ability and of so much force of character, whose absence from the community of great minds at the bar was so conspicuous, fretting in a common jail under a sentence every sensible man knew was unjust

and made to fit the occasion, created no little sensation, and efforts were made by many of his influential friends to obtain his release. Some more enthusiastic than others appealed to the President for a pardon, and the department of justice, through Hon. Zach Montgomery, was petitioned, but without effect. All attempts to induce him to petition the court for a pardon or mitigation of the sentence were unavailing, until his old friend and former associate upon the Supreme Bench, ex-Judge Solomon Heydenfeldt, prevailed upon him to present a petition. Letters passed between them through the friendly assistance of Hon. John A. Stanley, as follows:—

SAN FRANCISCO, September 10, 1888.

MY DEAR MR. TERRY: The papers which my friend Stanley sends you will explain what we are trying to do. I wish to see Field to-morrow and sound his disposition, and, if it seems advisable, will present your petition; but in order to be effective, and perhaps successful, I wish to feel assured and be able to give the assurance in case of a favorable issue, that it will not be followed by any attempt on your part to break the peace, either by violence or denunciation. I know you would never compromise me in any such manner, but it will give me the power to make an emphatic assertion to that effect, and that ought to help. Please answer promptly. Yours as ever,

S. HEYDENFELDT.

This letter expresses the belief that existed with others, that the long term of imprisonment imposed was simply the result of cowardly fear, and not as a punishment for contempt. Judge Terry answered it in the following language:—

OAKLAND, September 11, 1888.

DEAR HEYDENFELDT: Your letter was handed to me last evening. I do not expect a favorable decision from any applica-

tion to the court, and have very reluctantly consented that an application may be made. Field probably wishes to pay me for my refusal to aid his presidential aspirations four years ago.

I had a conversation with Garber on Saturday last, in which I told him that if I was released I would seek no personal satisfaction for what is past. You may say, as emphatically as you wish, that I will not commit a breach of the peace; that so far as seeking I will avoid meeting any of the parties concerned; but I will not promise that I will refrain from denouncing the decision and its authors. I believe that the decision was purchased and paid for with the coin of the Sharon estate, and I would stay here ten years before I would say what I did not believe.

If the judges of the Circuit Court wish to do what is right they should revoke the order imprisoning my wife. She certainly was in contempt of court, but the provocation given by going entirely out of the record to besmirch her, ought to be taken into consideration in mitigation of the sentence.

Field, when a legislator, thought that no court should be allowed to punish for contempt by imprisonment for a longer period than five days. My wife has already been imprisoned double that time for words spoken under very just provocation. No matter what the result of the application, I propose to stay here until my wife is discharged. Yours truly,

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There is no mistaking this language, and from it the attitude of Judge Terry toward the judges who had figured in this case. He had no hesitation in expressing the opinion that the decision was fashioned after a "cheque" from the Sharon estate, and he was not alone in that belief. He had said on other occasions that he had seen men "mounting to judicial positions on golden stirrups, and knew their mercenary and yielding dispositions," and he had also said that "Field had never rendered a decision against a corporation in his life." The state of mind in which he now was admitted of expressions where other oc-

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cations would have suggested to his taciturn mind the policy of silence. His petition for release presented the case in his usual deliberate and forcible style, and was as follows:—

IN JAIL AT OAKLAND, September 14, 1888.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

To the Honorable Circuit Court aforesaid—

Your petitioner represents that, in all matters and transactions occurring in the said court on the third day of September, 1888, upon which the order in this matter was based, your petitioner did not intend to say or do anything disrespectful to said court or to the judges thereof, or to any one of them. That when petitioner's wife, the said Sarah Althea Terry, first arose from her seat, and before she uttered a word, your petitioner used every effort in his power to cause her to resume her seat and remain quiet, and he did nothing to encourage her in her acts of indiscretion; when this court made the order that petitioner's wife be removed from the court room, your petitioner arose from his seat with the purpose and intention of himself removing her from the court room quietly and peacefully, and he had no intention or design of obstructing or preventing the execution of said order of the court; that he never struck, or offered to strike, the United States marshal until the said marshal had assaulted him, and had, in his presence, violently, and as he believed, unnecessarily assaulted petitioner's wife.

Your petitioner most solemnly avers that he never drew, or attempted to draw, any deadly weapon of any kind whatever in said court room, and that he did not assault, or attempt to assault, the United States marshal with any deadly weapon in said court room or elsewhere. And in this connection he respectfully represents that after he had left such court room he heard loud talking in one of the rooms of the United States marshal, and among the voices proceeding therefrom he recognized that of his wife, and he thereupon attempted to force his way into said room through the main office of the United States marshal. The door of this room was blocked with such a crowd

of men that the door could not be closed; that your petitioner then, for the first time, drew from inside his vest a small sheath knife, at the same time saying to those standing in his way in said door that he did not want to hurt anyone; that all he wanted was to get in the room where his wife was. The crowd then parted and he entered the doorway, and there saw a United States deputy marshal with a revolver in his hand pointed at the ceiling of the room. Someone then said, "Let him in if he will give up his knife," and your petitioner immediately released hold of the knife to someone standing by.

In none of these transactions did your petitioner have the slightest idea of showing any disrespect to this honorable court or any of the judges thereof; that he lost his temper, he respectfully submits, was a natural consequence of himself being assaulted when he was making an honest effort to peaceably and quietly enforce the order of the court, so as to avoid a scandalous scene and of seeing his wife so unnecessarily assaulted in his presence.

Wherefore your petitioner respectfully requests that this honorable court may, in the light of the facts herein stated, revoke the order made herein, committing him to prison for six months, and your petitioner will ever pray, &c.

D. S. TERRY.

This petition was presented to the court by Judge Stanley, and immediately a regular court of inquiry was instituted to present evidence to controvert the statements made by Judge Terry in his application for release. Affidavits were prepared and filed by the United States marshal and several of his deputies and a statement submitted by Justice Field, no two of which were identical in the relation of facts, and all taking issue with, and denying, those presented by the petitioner. This was readily accounted for in the fact that Judge Terry had imposed upon him a notoriety for rashness that he did not fully possess nor deserve. His presence in the midst of such an exciting scene instituted by his wife, and in which he became per-

crime of Lee. He said that Lee was a villain who should be hanged, and more than that he was a scoundrel who would have been put in jail long before but for Field's intervention. All this came to Lee's ears and he determined to stop Judge Field's mouth. So he wrote Field a letter saying that unless he retracted all that he had said about him he would whip him on sight. Field was very much agitated at such a threat from such a man, and went to his friend Baldwin for advice, as Judge Terry, on whom he relied, was out of town. Baldwin said, "That fellow Lee will assault you and perhaps kill you if you don't retract, and perhaps you had better satisfy him." This must have been in consonance with Field's wishes, for he at once sat down and wrote an ample retraction and sent it to Lee. Lee having got the measure of his man, proceeded to rub it in by causing an account of the circumstance to be printed in a public newspaper and with it the Field letter of retraction. It was published in a newspaper called the *Age*, since rechristened the *Bee*, and naturally Field's backdown became the talk of the town. The day it was published Terry came back to town and he saw Mrs. Fairfax and heard from her what Field had promised to do. Then he went to his chambers, and the first thing he saw was the *Age* containing the copy of Field's retraction. Soon Field entered, and handing him the paper Terry said, "Judge, is this true?" Field seized the paper and read the item. Then his face turned livid with shame and rage, and he dashed the paper at Baldwin, who was there, crying out: "See what you have made me do, Baldwin; see what

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sonally involved, was a signal for trepidation and fear, and in the expectation that something would happen that did not many surmised that it did, and if it did not it was safe to say that it did, and they were justified in swearing to it. Such is fame. The wild reports on the streets and general alarm that prevailed in the court room were sufficient evidences that no reliance could be placed upon any positive statement of facts, and they also go to prove that the testimony presented by these men, although honestly and candidly given, was worthless in connection with the true state of affairs. "The best of knowledge and belief" has been a convenient city of refuge for, and a shield to protect, many persons from committing rank perjury. It has been the testimony of every man whose moral standing was worthy of note who knew Judge Terry in all the trials of his life, that his words always bore the "stamp of incontestible truth," and that he was the most bitter and relentless enemy of trickery, fraud and chicanery. Nothing has ever transpired up to the present time to destroy that confidence in his high integrity, and, as between him and his adversaries in this instance, there is but one choice to make. It may have been the judgment of the court that, according to his own testimony, he was sufficiently guilty to demand the punishment as adjudged, and the petition was denied.

CHAPTER XLIII.

POLITICAL OSTRACISM—POWER OF THE FEDERAL JUDGES—TERRY'S GREAT WORK TO COMBAT THE POWER OF MONEY BY LEGAL ARGUMENTS—HIS CELEBRATED PETITION FOR A REHEARING OF THE SHARON VS. SHARON CASE BEFORE THE SUPREME COURT—A REMARKABLE DOCUMENT.

Political ostracism is one of the potential weapons that are used to destroy the confidence of the people in the perpetuity of a free government. The exercise of such a power over the cringing slaves to political bosses presents an impediment to honesty and integrity—virtues that are becoming extinct and obsolete in the directory of public servants. The power held by corporations is an overpowering one, and although high tribunals of justice are occupied by men who strut in garbs of sovereign and exclusively independent will and action, the reins are held by other hands, like the spirit of evil that guides the storm and the tempest in their course of desolation. The people who were sovereigns once are sovereigns no more, except when the day of wrath and retribution is forced upon them through excesses in corrupt practices or aggressive autocracy by officials.

While in the Alameda County Jail Judge Terry was visited by numerous admirers, but seldom by officials,

although he had many sympathizing friends holding official positions. They feared the influence that Justice Field had with the Federal authorities and the powerful corporations. One gentleman, who was a great admirer of Terry, and who had a son employed in the service of one of the large corporations, unwittingly visited the judge while he was in jail. In a few days thereafter his son was discharged and no reason given for the act. In the course of inquiry he was made to understand the cause, and being a man of spirit, he informed the agent of the company that if his son was not re-instated he would give the facts, and the names of the parties in proof, to the world. In due time his son was re-instated.

A man who holds a Federal position in San Francisco—a Republican—and an old-time friend of Judge Terry, in presenting to the writer some valuable information in connection with the judge, was very particular in demanding that his name be suppressed in relation to the facts. "For," said he, "if it should appear in a friendly and favorable mention of Judge Terry I would lose my position in a few days. You have no conception of the power that Field exercises over the senators and representatives in Congress through his friendship to the corporations." In the strides to a "higher civilization" the directory is transferred from the creative power lodged in the consciences of the masses, who are right as a rule, to the purchasing power that has entered the field of speculation in the broad channels of manhood. As a commercial commodity manhood has entered the field and opened the flood gates of vice, corruption and inevitable revolution.

David S. Terry made no further attempt to secure release from prison, and was content to submit as a precedent for outrage in the hands of judicial authority. A contempt that required six months to atone for was one of the anomalies in jurisprudence, and there was only one man in this country who could fathom the extent of the crime committed, and that man was the individual that Judge Wallace characterized as the "ablest man that lived, that ever had lived, or ever would live," and Judge Terry was the most prominent man to make the example of, as his position would lend both force and effect to the transaction and give prominence to Justice Field as a creator of a new idea. But time was everything to Field. He could not afford to uncage the lion until he had crossed the continent.

While in prison Judge Terry did not fret and fume always. He was allowed privileges by the sheriff not granted ordinary criminals, and his wife, who remained with him until the day of his discharge, administered to his wants. During the time he commenced and prosecuted the work of preparing his argument on motion for a rehearing of the Sharon *vs.* Sharon case before the Supreme Court, and also an argument on the question of irrigation, which was in process of trial before the Superior Court of Tulare County, involving large landed interests. The former of these two documents was a marvel in research and in the presentation of facts, and has been designated by a gentleman of high judicial and legal standing, and a member of the Supreme Bench, as the most remarkable and valuable contribution to the literature of the legal profession ever presented.

As an example of its marshaling of facts and argument, the following quotations will be interesting to that large portion of patrons who will necessarily read this book:—

“That the opinion of the court is in violation of a rule of law which has been settled by the Supreme Court of this State in a long and unbroken line of decisions, beginning with *Dewey vs. Gray* (2 Cal. 374). In *Hayne on New Trial and Appeal*, section 271, the rule is stated as follows: ‘However erroneous a decision of the Supreme Court may be, it must be adhered to in all subsequent proceedings in the same case. It becomes the law of the case and cannot be disregarded either by the trial court or the Supreme Court. *This rule is firmly established.* It was first announced in *Dewey vs. Gray* (2 Cal. 374). In that case, with reference to its decision on a former appeal, the court, per Heydenfeldt, J., said: ‘The latter part of the decision is in abrogation of one of the plainest principles of law, and if this case was a new one I should not hesitate to overrule it, but legal rules deprive us of the power to do so. The decision having been made in this case, it has become the law of the case, and is not subject to revision.’ The doctrine of *Dewey vs. Gray* was followed and approved in subsequent cases.’ (Citing *Clary vs. Hoagland*, 6 Cal. 683.)

“In *Leese vs. Clark* (20 Cal. 416), Field, C. J., delivering the opinion of the court, said: ‘The decision of this court on the first appeal became the law of the case and fixed the right of the parties in this action under their respective grants. A previous

ruling of the appellate court, as we held in *Phelan vs. San Francisco*, upon a point distinctly made, may be only authority in other cases to be followed and approved, or to be modified or overruled, according to its intrinsic merits; but in the case in which it is made, it is more than authority—it is a final adjudication from the consequences of which the *court cannot depart* nor the parties relieve themselves. (20 Cal. 39.) Such has been the uniform doctrine of this court for years, and after repeated examinations and affirmations *it cannot be considered as open to further discussion*. (See *Dewey vs. Gray*, 2 Cal. 377; *Clary vs. Hoagland*, 6 Cal. 687; *Gunter vs. Laffan*, 7 Cal. 592; and *Davidson vs. Dallas*, 15 Cal. 82.) Nor is the doctrine peculiar to this court. It is the established doctrine of the Supreme Court of the United States and the Supreme Courts of several of the States (*ex parte Sibbald*, 12 Peters, 491; *Washington Bridge Co. vs. Stewart*, 3 How. 413; and *Russell vs. La Rogue & Hatch*, 13 Ala. 151). And the reason of this doctrine is obvious. The Supreme Court has no appellate jurisdiction over its own judgments; it cannot review or modify them after the case is once past by the issuance of the remittance from its control. It construes, for example, a written contract, and determines the rights and obligations of the parties thereunder, and upon such construction it *affirms the judgment* of the court below. The decision is no longer open for consideration; *whether right or wrong it has become the law of the case*. This will not be controverted.

“‘So, on the other hand, if upon the construction of

the contract supposed, this court reverses the judgment of the court below and orders a new trial, the decision is equally conclusive as to the principles which shall govern on the retrial; it is just as final to that extent as a decision directing a particular judgment to be entered, as to the character of such judgment. The court cannot recall the case and reverse its decision after the remittitur is issued. It has determined the principles which shall govern, and having thus determined, its jurisdiction in this respect is gone. And if a new trial is had in accordance with its decision, no error can be alleged in the action of the court below. (Young *vs.* Frost, 1 Md. 374; McClellan *vs.* Crook, 7 Gill. 338).'

“In Jaffe *vs.* Skae (48 Cal. 543), Wallace, C. J., delivering the opinion of the court, said: ‘It has always been the settled rule in this court that a decision rendered upon facts appearing on the record in which the legal effect of these facts is declared, is in all subsequent proceedings in the case, and so long as the facts themselves appear without material qualification, a final adjudication of the rights of the parties *from which the court cannot depart* nor the parties relieve themselves.’

“Upon this point I quote from the opinion of Mr. Justice Thornton:—

“‘In passing on the question presented by counsel in this case, it becomes necessary to determine what was determined in Sharon *vs.* Sharon (75 Cal. 1).

“‘The appeal in 75 California was from the judgment, and this is an appeal from an order denying a motion for a new trial in the same case.

“The opinion of the court in the former appeal was drawn up by Justice McKinsty and concurred in by Searls, C. J., and Temple and Paterson, J. J. To determine what was ruled on the former appeal we have to examine this opinion.

“In my judgment the following propositions were there decided to be law and applicable to the case:—

“First. That an agreement between a man and a woman to become husband and wife, made *per verba de præsenti*, is not invalidated by the fact that it contains a collateral promise by one of the parties not to make the marriage known for two years without the consent of the other.

“Second. That under section 55 of the civil code it is not necessary to the validity of a marriage, not attended by a solemnization, that the present consent to marry should be followed by a *public* mutual assumption of marital rights, duties, and obligations.

“Third. That sexual intercourse may be inferred from cohabitation; that evidence that a man and woman have had sexual intercourse, whether direct or consisting of proof of a further fact from which the intercourse may be inferred, as cohabitation, is, when preceded by the present consent of the parties to marry, evidence that the parties have actually assumed all the duties incident to marriage.

“Fourth. That present consent to marry kept secret, followed by secret cohabitation, is sufficient to constitute marriage.

“Near the close of the opinion it is said:—

“The court below found *as facts* that, during a certain period after the consent to marry, “the plain-

tiff and defendant lived and cohabited in the way usual with married people . . . and mutually assumed toward each other their marital rights, duties and obligations." If, as we have said, they might mutually assume marital rights and duties, although their relation was kept secret, the insertion of the words "toward each other" does not vitiate the finding, and the finding of facts is conclusive on this appeal.' (75 Cal. 36.)

"As summing up the ruling in the opinion it is said: "Our conclusion is that the provision of the code requiring a mutual assumption of marital rights and duties to follow consent does not make it indispensable to the validity of the marriage that the relation between the parties shall be made public." (75 Cal. 37.)

"Although the word "public" is used in the portion last quoted from the opinion to qualify the nature of the relation, it should be observed that in the portion previously quoted (which by a few sentences precedes the portion last quoted) the qualifying words are, "although this relation was kept secret."

"It seems to me that the fair construction of the opinion is that it was intended to lay down the rules of law set forth in the propositions above stated as applicable to the relation between the parties, though it was during the whole period of their intercourse kept secret.

"In holding that the findings sustained the judgment, the points above stated were, in my view, necessarily held. If they had not been, the court could not have determined to affirm the judgment.

“Justice Temple concurred in the prevailing opinion, and expressed his views in plain and direct terms. He said: “The word ‘consummation’ was avoided in section 55, because it has come to be a euphemism for the more indelicate word *copula*, and thereby has acquired a more narrow meaning than was intended. Therefore the phrase which only indicates the assumption of the contract relation was used. But in section 57 the word ‘consummation’ is substituted for the phrase. It cannot mislead here, for it has been defined, but it shows that the mutual assumption of marital rights, duties or obligations is of the nature of consummation—something in the nature of part performance of the consent to present marriage, though that is not limited to the *copula*.”

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“In *Leese vs. Clark* the question of the conclusiveness of the former decision in this court is considered. It is there said: “But in the case in which the decision is made it is more than authority—it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves.” After stating that this has been the uniform doctrine of this court for years, and after repeated examinations and affirmations it cannot be considered as open to further discussion, and that it is the doctrine of the Supreme Court of the United States and of the Supreme Courts of several of the States, citing several authorities for the statements made, the opinion proceeds thus: “And the reason of the doctrine is obvious. The Supreme Court has no appellate jurisdiction over its own judgments; it cannot

review or modify them after the case has once passed, by the issuance of the remittitur, from its control. It construes, for example, a written contract and determines the rights and obligations of the parties thereunder, and upon such construction it affirms the judgment of the court below. The decision is no longer open for consideration. Whether right or wrong, it has become the law of the case. This will not be controverted. So, on the other hand, if upon the construction of the contract supposed this court reverses the judgment of the court below and orders a new trial, the decision is equally conclusive as to the principles which shall govern on the retrial. It is just as final to that extent as a decision directing a particular judgment to be entered is as to the character of such judgment. The court cannot recall the case and reverse its decision after the remittitur is issued. It has determined the principles of law which shall govern, and having thus determined, its jurisdiction in that respect is gone. And if the new trial is had in accordance with this decision, no error can be alleged in the action of the court below.”

The court decided on the several points that—First, the contract was genuine. Second, that the evidence does establish what was found by the trial court, and the court on the former appeal held this was, with other matters, found sufficient to constitute marriage.

“The opinion then proceeds to examine the evidence to support the third finding that the parties assumed toward each other marital rights, duties and obligations, and arrives at the conclusion that it is shown

by the evidence that the parties did not live together in a common home; that they did not hold themselves out to the public as husband and wife, but represented themselves as single persons; and therefore, as there was no public assumption of marital rights, duties, or obligations, the marriage was invalid.

“We submit that in arriving at this conclusion the court lost sight of a rule equally as well established as the one cited as a reason for not disturbing the present finding—that is, the rule which makes the decision of the appellate court upon a question litigated before it the law of that case and a finality. This very question was fully argued by both sides on the appeal from the judgment; it was as fully presented on that appeal as on this, and was the only question involved in that appeal.

“The ninth finding (transcript, folio 71) was asked by the defendant for the sole purpose of presenting this question squarely to the appellate court on the appeal from the judgment. It did present the question, and that question was decided.

“The ninth finding is as follows: ‘That defendant never introduced plaintiff as his wife, nor spoke of her as such in the presence of other persons; that plaintiff never introduced defendant as her husband, nor spoke to nor of him to other persons in his presence as her husband; that the parties were never reputed among their mutual friends to be husband and wife, nor was there at any time any mutual open recognition of such relationship by the parties, nor any public assumption by the parties of the relation of husband and wife.’

“It cannot be contended that the evidence in the

record presents this point in any stronger light than it is presented by the findings. An examination of the record of the case of *Sharon vs. Sharon*, decided by the Supreme Court of California in January, 1888, and reported in 75 Cal., page 1, will conclusively prove that the question as to whether a public assumption of marital rights, duties or obligations was necessary to the validity of a marriage in this State, was clearly presented by that record, that it was fully considered, and was the only question decided upon the appeal from the judgment. The other points decided in the opinion of the court arose on the appeal from the order for alimony and counsel fees, which was in the same record, the two appeals being argued together.

“The briefs and arguments of counsel on file in the record will show that this was the only point *argued* on the appeal from the judgment. Though the record of two appeals was contained in one transcript, and both were argued together, the appellant’s attorneys filed separate briefs—one on the appeal from the judgment, the other on the appeal from the order awarding alimony and counsel fees. And in the briefs on appeal from the judgment one point only was made and argued, that is, whether it was necessary to the validity of a marriage not solemnized that there should be an open public assumption of marital rights, duties or obligations.

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“The brief of Stewart & Herrin, also for appellant, quotes the ninth finding of Judge Sullivan in Italics, and then proceeds: ‘The question presented by this record is, Can a marriage be constituted in this State

without a solemnization, while its existence is, by agreement of the parties as well as by their conduct, concealed from all third persons?' (Page 6 of the brief of Stewart & Herrin.) The argument of Judge Hoge, which is printed and on file, is confined to a discussion of that single question, which was squarely presented in the record as well as in the briefs and arguments of counsel on both sides.

"There was no quibbling attempt to distinguish between concealing the contract and concealing the marriage. It was not suggested that the promise not to disclose the contract or its contents did not bind the party to conceal the marriage, or that the party was at liberty to 'palter in a double sense and keep the word of promise to the ear and break it to the hope.'

"But the question argued and submitted to the court was whether concealment of the marriage by the parties and holding themselves out to their acquaintances and the public as unmarried persons, renders the marriage invalid. That was the only question presented by the record, and that was the only question decided by the court.

"That decision pronounced in this case became and is the law of the case, and cannot be reversed in the same case without a violation of a rule of law, which the Supreme Court, as early as 20 Cal., declared to be so well established as not to be open for further discussion. In view of the fact that the question whether the concealment of the fact of marriage, and a want of any public assumption of marital rights, would render invalid and unsolemnize marriage under the laws of California, had been solemnly decided by this

court in this very case, and in view of the numerous decisions of this court as to the law of the case, it is not surprising that appellant's counsel did not make an extended argument on this appeal on the point decided in this very case, but, relying on the prior decisions of this court, 'dismissed the question so important to their client on a general statement of the views covering these pages of the brief.'

"The opinion of the court discusses the policy of the law of marriage and the evils which will follow from the provisions of the civil code concerning marriages, as construed by the Supreme Court in the appeal from the judgment in Sharon *vs.* Sharon.

"Our reading of the constitution has taught us that the policy of laws was a matter to be determined exclusively by the Legislature; that courts have no jurisdiction to inquire whether a statute duly enacted by the Legislature is politic or the reverse, or whether its effect will promote or hinder the prosperity of the country or the people; and, though courts have sometimes assumed to amend statutes by judicial construction, such attempts are in violation of the constitution, of the oath taken by the judges to support the constitution, and are plain usurpations by the courts of the powers confided by the organic law to the legislative department of the government.

"A conclusive reply to that part of the opinion of the court in this case which descants on the evils which will follow if the law enacted by the Legislature, as construed by the Supreme Court on the appeal from the judgment, prevails, is: That though the act has been in force for sixteen years, no such results have

followed; that the decision of the Superior Court in *Sharon vs. Sharon*, giving the same construction to the civil code as was given by the Supreme Court in 1888, was rendered and published in December, 1884. Yet the law-making power, which is the sole and exclusive judge of the policy of laws, has not repealed or amended the sections of the code so construed. There have been three regular sessions of the Legislature since the decision of the Superior Court in the case of *Sharon vs. Sharon*. The case attracted more attention than any other case ever tried in this State. The evidence was very fully published in the newspapers, and was read by the people in every county and village in the State. The same publicity was given to Judge Sullivan's decision. Yet the Legislature was unable to discover any of the evils which this court sees in the provisions of the code on the subject, and the code was in nowise changed. The universal construction of the code, by both lawyer and layman, was that given by the Superior Court—the only construction which can be given to its plain language without adding words which the Legislature did not use. The people and the Legislature were satisfied with the law, and refused to amend or repeal it.

“The decision of the Supreme Court on the appeal from the judgment in *Sharon vs. Sharon* was delivered in January, 1888. In November of that year a Legislature was elected, which met in January, 1889. No member of this Legislature was able to see any of the evils which would result from the law as construed by the Supreme Court, and no attempt was made to

amend it. In view of all these facts, we respectfully submit that any attempt by a court to amend the civil code by judicial construction will be a plain usurpation of legislative functions, and a violation of the constitution of this State.

“There is an attempt, in the opinion of Justice Works, to show that the well-established doctrine of the law of the case does not apply to this appeal, and that the decision of this court on the appeal from the judgment in *Sharon vs. Sharon* does not prevent or hinder the court from deciding the question raised by appellant's counsel that the secret assumption of marital rights, duties or obligations, was not a sufficient compliance with the code to render the marriage by contract valid. He says: ‘The sole and only question presented to this court for decision on the appeal from the judgment was whether or not, assuming that every act necessary to constitute a valid marriage had been done by the parties, the fact that *one or more of those necessary requirements of the statute had been kept secret would nullify the same and render the same invalid.*’

“No such construction was ever before given to that decision. The justices who wrote dissenting opinions in that case did not so understand it. The dissenting opinion of Justice McFarland does not even hint at such an understanding. The opinions of Justice Thornton in that case and this are both clearly repugnant to such an understanding. The language of the opinions of Justices McKinstry and Temple clearly disproves such a construction of the point argued and decided on that appeal. Not one of the justices who were in consultation over that case, and who, it must

be presumed, understood the questions they were to decide, ever construed the decision as does Justice Works, who did not hear the argument or read the briefs, and therefore did not know that the only question argued by counsel for appellant and decided on that appeal was, as stated in the brief of Stewart & Herrin: 'Can a marriage be constituted in this State without solemnization while its existence is, by an agreement of the parties as well as by their conduct, concealed from all third persons?'

"To arrive at his understanding of the former decision and to draw a distinction between the questions presented on the two appeals, Justice Works was obliged to ignore the ninth finding of facts by Judge Sullivan, which finds all that Justice Works says the evidence shows, and presents the question of the validity of a marriage by written contract carefully concealed, followed by the secret assumption of marital relations, as fully and squarely as could be presented in any case, and was squarely met and decided by the court. The finding is as follows:—

"'9. That defendant never introduced plaintiff as his wife, nor spoke of her as such in the presence of other persons; that plaintiff never introduced defendant as her husband, nor spoke to nor of him to other persons in his presence as her husband; that the parties were never reputed among their mutual friends to be husband and wife, nor was there at any time any mutual, open recognition of such relationship by the parties, nor any public assumption by the parties of the relation of husband and wife.'

"The court distinctly found that there was not at

any time any mutual, open recognition or public assumption of the relation of husband and wife by the parties.

“Justice Work’s construction of the former decision did not satisfy himself, and being conscious that he had completely failed to maintain his position as to what the court decided on the appeal from the judgment, abandons it, choosing rather to ‘beard the lion in his den’ by boldly sweeping away *everything* that was decided, and claiming that the case did not fall within the rule of ‘the law of the case.’

“He says that where two appeals are taken, one from the judgment and one from an order denying a motion for a new trial, the principles announced by the court in the affirmance of the judgment are not binding on the court on the hearing of the appeal from the order refusing a new trial, and may be modified or wholly changed if thought to be erroneous.

“The reason assigned for this new doctrine is that—

“‘The law of this State permits two appeals in the same case, one from the judgment and the other from the order denying a new trial. Both of these appeals have a direct effect on the judgment, and if successful may vacate it entirely or modify it, as the court may determine. These appeals may both be prosecuted and be pending in this court at the same time, as was the case here until the appeal from the judgment was disposed of. The fact that this court has declared a rule of law in deciding the appeal first reached for decision, and upon which no action has or can be taken until the second appeal is also disposed of, cannot, by

reason of the rule invoked by the respondent, prevent the court from fully investigating and deciding the second appeal to the extent of modifying or wholly changing its former decision, if it be satisfied that an error has been committed. The case must be regarded as within the control of this court until both appeals are determined.'

"This is at variance with all that has ever been said upon the subject by law writers and the authorities. It will be seen that he does not cite a *single* case in support of the doctrine. What he decides is at variance with all that has ever been said on the subject by law writers and by the courts.

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"If the several appeals allowable in a case are within the control of the court until all are determined to the extent that the court can modify or wholly change any ruling made in either, then all the appeals should be heard together; for it is useless waste of time to have one appeal heard and determined when the principle upon which it is determined is subject to modification or change upon the hearing of the other appeals.

"The failure of the respondent to enter into an extended discussion of 'the question so important to their client' was due solely to the fact that the question had been fully argued and decided on a former appeal of this same case. If the doctrine of the law of the case is to be overturned and the question is to be re-examined in this case, we invite the attention of the court to some of the authorities cited in our argument and brief on the former appeal, which we respectfully submit cannot be answered.

"I am not here to deny—nor would any lawyer have the face to get up and deny in the presence of a court of respectable attainments—that contracts against public policy, against good morals, and against the express provisions of the statute, are null and void. But I do deny—and I say that no authority can be found in any book for the proposition, that the contract found in the second and third findings of Judge Sullivan in this case is against public policy, against good morals, or opposed to the prohibition of any statute. I say that it is a contract perfectly legal and valid under the laws of California, and under the law of every civilized country in the world, with the exception of England, and that it would have been a perfectly valid contract in England up to the twenty-sixth year of the reign of George II., when the Marriage Act was passed; that before that time, according to all the authorities, English and American, a promise in words of the present, to take a woman for a wife and a man for a husband, a mutual promise, constituted a marriage; that it constituted a marriage at common law, and that it constitutes a marriage in every State of the Union, with the exception, I admit, of California, where the statute requires something more. But I say that the only respect in which the statute of California changes the common law rule is in the provision that consent alone does not constitute the marriage contract; it must be followed by something else. It must be followed by a solemnization, or by the mutual assumption of rights, duties, or obligations.

"I propose to read those statutes in this connection.

Of course the rule in construing a statute is to take it all together. This code is one statute. The four codes are one statute, and are construed as one law. Now the article on personal relations, Title 1, Marriage, commences at section 55, which defines what marriage is. It is defined to be 'a personal relation arising out of a civil contract, to which the consent of the parties capable of making it is necessary. Consent alone will not constitute marriage. It must be followed by a solemnization or mutual assumption of marital rights, duties, or obligations.'

"Now what, in the first place, are the rights of marriage? Cohabitation and sexual intercourse are rights which follow that institution. What are the duties which devolve upon a husband by that contract? That he shall support his wife, provide for her support and sustenance, and provide for her a residence. All that is shown in the findings to have been done. What are her duties? To live with him and be a companion to him; to perform the duties he requires of her. Now the court finds that this contract of marriage was entered into between these parties on the 25th of August, 1880; that they each signed the paper, which is set out in the findings, and which I say in any country in the world except England would at this present time constitute a valid and binding marriage without anything else whatever. And it would have been a good and valid marriage in England before the twenty-sixth year of the reign of George II. The gentlemen would ask the court to add a word to that statute. They ask the court by judicial legislation to add the words 'public mutual

assumption of marital rights and duties.' If that is to be done it must be done by the Legislature by legislative action, and not by judicial legislation. Our government is divided into three departments, legislative, executive and judicial. It is the province of the Legislature to pass laws, to amend laws, to change laws. It is the province of the courts to construe the laws, and they should be able to say in support of their decisions, 'Thus the law is written.' You cannot add one word to, or subtract one word from the statute, which expresses the sovereign will of the law-making power. You are here to construe and not make laws. What we ask is that this law shall be construed according to the rules of construction laid down in all the books, and according to the expressed will and intention of the Legislature as expressed in the law itself. There is no room for construction. The law is so plain that a wayfaring man, though a fool, cannot err in construing it.

"All marriages are lawful except incestuous marriages, marriages between whites and blacks, and marriages during the lifetime of a former wife or husband who has not been divorced. All the other provisions are directory, and although the Legislature must have known—although there must have been lawyers in the Legislature who must have known the rules—the universal rule, which has been adopted by the courts of the United States and the courts of England, that these statutes are merely directory, and that a failure to comply with the provisions of the statute, although it may subject the parties to prosecution or punishment for a crime or misdemeanor,

does not affect the validity of the marriages. Yet out of abundant caution the Legislature provided, in section sixty-eight, that non-compliance did not invalidate any lawful marriage. The books are full of those cases from almost every State in the Union. I won't take time to read the cases, but I shall read only one or two.

"I read from the case of *Meister vs. Moore* (96 U. S. 76). The opinion commences on page seventy-eight. It was a case which came up in the Circuit Court of Michigan, and involved the validity of a marriage which took place under the laws of that State.

"Mr. Justice Strong delivered the opinion of the court: 'The learned judge of the Circuit Court instructed the jury that if neither a minister nor a magistrate was present at the alleged marriage of William A. Mowry and the daughter of the Indian Pero, the marriage was invalid under the Michigan statute, and this instruction is now alleged to have been erroneous.

"It certainly withdrew from the consideration of the jury all evidence, if any there was, of informal marriage by contract by *verba de presenti*.

"That such a contract constitutes a marriage at common law there can be no doubt, in view of the adjudications made in this country from its earliest settlement to the present day.

"Marriage is everywhere regarded as a civil contract. Statutes in many of the States, it is true, regulate the mode of entering into the contract, *but they do not confer the right.*

“‘Hence they are not within the principle that where a statute creates a right and provides a remedy for its enforcement the remedy is exclusive.

“‘No doubt a statute may take away a common law right, but there is always a presumption that the Legislature has no such intention unless it be plainly expressed. A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or clergyman, or that it be preceded by a license or publication of bans, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as distinctive of a common law right to form the marriage relations by words of present assent. And such we think has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held marriages good at common law to be good notwithstanding the statutes, unless they contain express words of nullity. This is the conclusion reached by Mr. Bishop after an examination of the authorities.’ (Bishop on Marriage and Divorce, section 283 and notes.)

“In *Parton vs. Hervy* (1 Gray, Mass., 119), where the question was whether the marriage of a girl only thirteen years old, married without parental consent, was a valid marriage (the statute prohibiting clergymen and magistrates from solemnizing marriages of females under eighteen without the consent of parents

or guardians), the court held it good and binding, notwithstanding the statute.

“In speaking of the effect of statutes regulating marriage, including the Massachusetts statute, the court said: ‘The effect of these and similar statutes is not to render such marriages when duly solemnized, void, although the statute provisions have not been complied with. They are intended as directory upon ministers and magistrates, and to prevent, as far as possible, the solemnization of marriages when the prescribed conditions and formalities have not been fulfilled. But in the absence of any provision declaring marriages not celebrated in a prescribed manner or between parties of certain ages absolutely void, it is held that all marriages regularly made according to the common law are valid and binding, though had in violation of the specific regulations imposed by statute.’

“‘We will not undertake to cite the numerous authorities which sustain the opinion in *Parton vs. Hervey*, 1 Gray. Reference is made to them in Bishop on Marriage and Divorce, section 283, *et seq.*; in Reeve’s Domestic Relations, 199, 200; in Kent’s Commentary, 90, 91, and in 2 Greenleaf on Evidence. The rule deduced by all these writers from the decided cases is thus stated by Mr. Greenleaf: ‘Though in most, if not all, of the United States, there are statutes regulating the celebration of marriage rites, and inflicting penalties on all those who disobey the regulations, yet it is generally considered that, in the absence of any positive statute declaring that all marriages not celebrated in the prescribed manner

shall be void, or that none but certain magistrates or ministers shall solemnize a marriage, any marriage regularly made according to the common law, without observing the statute regulations, would still be a valid marriage.' As before remarked, the statutes are held merely directory; because marriage is a thing of common right; because it is the policy of the State to encourage it, and because, as sometimes has been said, any other construction would compel holding illegitimate the offspring of many parents conscious of no violation of law.'

"The right to marry is not given by the statute; it existed before the statute. In the language of the books, it is not the child, but the parent, of civil government; and in the language of Lord Stowell, a marriage might exist between a man and woman if there were no third person upon the face of the earth, as was the case of the parents of mankind. The statute does not confer upon anybody the right to marry, and a statute which prohibited marriage would be void.

"In the month of April, 1850, the Legislature of California adopted the common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the constitution and laws of this State, as the rule of decision in all the courts. At common law the paper copied in the second finding would have itself constituted a marriage. When the parties, being competent, agree in the present to marry, using words in the present, as, 'I do take you for my wife,' 'I do take you for my husband,' the marriage is complete without ceremony

or consummation. Nothing more is needed than in language that is mutually understood the parties accept each other as husband and wife.

“A maxim of the civil law, equally also of the ecclesiastical, of the common law, indeed of all law, is *consensus non concubitus facit matrimonium*. Hence, when parties capable of intermarriage agree to present marriage the matrimonial relation is made thereby complete, and what is sometimes called the consummation adds nothing to it. This is true everywhere, subjected to the qualification that in some countries there are statutes requiring the addition of specified ceremonies and forms, but the compliance gives the marriage nowhere any additional strength.’

“According to the argument of the counsel who opened the case on the part of the appellant, there can be no direct evidence of the contract, but it must be shown in every case by cohabitation and reputation; that is one way of proving it, when there is no direct evidence; that is an inferior class of evidence. The direct evidence of the contract itself, by producing the signatures of the parties or the witness who was present when the contract was made, is far better than circumstantial evidence. In many, if not all the States of the Union, statutes have been adopted regulating the mode in which such contracts shall be entered into, and providing the means by which evidence of its execution shall be preserved, and also providing for the infliction of punishment on those who fail to comply with these laws; these statutes do not confer the right; they simply provide the mode of entering such contract, and notwithstanding the existence of

such enactment, unless it is therein expressly provided that all marriages not entered into in conformity therewith shall be void, or that none but certain designated officers shall solemnize the contract, all marriages entered into in conformance with the common law, *per verba de presenti*, are valid and binding.

“Judge Sullivan, in opinion, deciding *Sharon vs. Sharon*, placed a considerable degree of reliance upon an article, or rather a note to an article, written by John Norton Pomeroy, in the *West Coast Reporter*, which he was then publishing. This note, I think, appeared in the edition of that paper published on the ninth day of October, 1884. The paper was a weekly publication. It appears from this record that shortly after that publication the counsel for the defendant in this case wrote a note to Mr. Pomeroy. What further communication was had I do not know. What further inducements were offered I do not know. What sized fee, if any, was paid to Mr. Pomeroy to come in as an advocate in this case I do not know; but on the twenty-third day of October, 1884, there was a sort of retraction, or explanation, or apology, made in that periodical. I propose to read the article itself, and I propose to read the second article, which apologized for it. Now, this article, which was written upon the true construction of the civil code, and referring to section 55 of the civil code of the State of California, the article being upon the true rules for interpreting the code. Mr. Pomeroy used this language as to the meaning of the words ‘marital rights, duties and obligations.’

“ ‘Does it mean that two spouses must openly live as

husband and wife, must hold each other out to the world as husband and wife? There are strong arguments against that meaning. In the first place, the phraseology to describe exactly that condition has long been and is very familiar, and if the authors of the code had such a meaning it seems hardly possible that they should reject this familiar and expressive phraseology. Instead of saying that consent must be followed by habit and repute, or by the parties holding each other out to the world as husband and wife, which would have left no doubt as to their meaning, they adopt this uncouth phrase, which does not necessarily have such a meaning; but in the second place such an alteration of the common law rule seems to be entirely without any reason and opposed to common sense. Under the law previous to the code proof that two parties had treated each other as husband and wife, had lived together as such, was sufficient to enable a jury or court to infer and find the fact of a marriage. Why, not at all, because such living and holding out of itself constitutes a marriage; but solely because from such living and holding out the court and jury may find that at some previous time the two parties did, as a fact, consent to be married; did, as a fact, agree to be husband and wife, the previous actual consent or agreement to be husband and wife is the ultimate and essential fact; the mode of life, the holding out and the like, are nothing but circumstantial evidence from which that fact may be inferred. Now, when living as husband and wife and holding out as such were only necessary evidence for the purpose of *inferring* the facts of a previous consent, it seems

strange and useless to require evidence of the same kind of holding and living as husband and wife and the like when the fact of a prior consent has already been clearly established by independent evidence. There seems to be no sense in such a great alteration of the common law doctrine.' . . .

" Now, I say that that language expresses the calm, impartial, unbiased and unbought opinion of a great lawyer, and it is entitled to all the weight that a deliberate opinion from that source is entitled to at the hands of a court. I submit that the second article, which is quoted in appellant's brief, affords an instance of the influence of wealth, and the facility with which a rich man may avail himself of the ability and learning of the most gifted man, and I say that no one who reads the explanatory, or I might say the exculpatory article of the twenty-third of October, can fail to see that it does not express the true opinion of the author as to the construction of the section referred to, and that it would have been better for the reputation of the writer if it had never been published. Now, let us see what that is.

" I read from Pomeroy's second article:—

" 'Whatever weight may be due to the considerations before suggested in the former article, there are, in my opinion, equal if not greater obstacles to an interpretation which treats the section as having made no material alteration in the rule as previously settled—the common law rule. If by the previous rule, after *verba in præsenti* the *copula* was sufficient to constitute a marriage, it seems almost impossible to suppose that in the phrase, "by a mutual assumption of marital rights,

duties or obligations," the authors of the code and the Legislature did not mean something more and different—something additional. We may wonder at the employment of terms so unlike the usual phraseology of statutes, and may regret that words more definite and certain in their meaning were not selected, and still, if we give any fair and reasonable signification to all the language, we can hardly escape the conclusion that "a mutual assumption of marital rights, duties or obligations" imports acts and conduct of the two parties toward each other, and rights and duties belonging to the marriage relation which cannot possibly be embraced in words "*copula*" or the word "consummation," or even, perhaps, the word "cohabitation;" exactly what is meant by the phrase, I repeat, only the courts can determine.'

"Now compare the language of those two articles one when he was writing for the instruction of his class and his readers, the other after he had been communicated with by the attorney for a defendant who was willing to pay \$25,000 for a worthless paper. I say further—and I say it upon the authority of the books, and challenge the production of any adjudicated case, or any opinion of the writer of a text-book, or any dictum of any respectable court to the contrary—that an agreement to keep a marriage secret will not invalidate it, neither will it necessarily involve in doubt the proofs of its existence. (1 Bishop on Marriage and Divorce, section 252; also, *Dalrymple vs. Dalrymple*, 4 Eng. Ecclesiastical, 485.) This authority I propose to read, because it is a case almost exactly like this, and was decided by one of the greatest

judges that ever presided over an English court, to wit, Lord Stowell, formerly Sir William Scott:—

“ ‘The facts of the case are these: Mr. John William Henry Dalrymple is the son of a Scotch noble family. At the age of nineteen, being a cornet in His Majesty’s Dragoon Guards, he went with his regiment to Scotland in the latter end of March or beginning of April, 1804. Shortly after his arrival he became acquainted with Miss Johanna Gordon, the daughter of a gentleman in a respectable condition of life. What her age was does not directly appear—she being described as of the age of twenty-one years and upwards—she was, however, young enough to excite a passion in his breast, and it appears that she made him a return of her affections. He visited frequently at her father’s house in Edinburgh, and at his seat in the country at a place called Braid. A paper without date, marked No. 1, is produced by her. It contains a mutual promise of marriage, and is superscribed “a sacred promise.” A second paper, No. 2, produced by her, dated July 11, 1804, contains a renewed declaration of marriage by him, and accompanied by a promise of acknowledging her the moment he has it in his power, and an engagement on her part that nothing but the greatest necessity shall compel her to publish this marriage. These two latter papers were inclosed in an envelope inscribed “sacred promises and engagements,” and all the three papers are admitted or proved in the cause to be of the handwriting of the parties whose writing they purport to be.

“ ‘It appears that Mr. Dalrymple had strong reasons for supposing that his father and family would

disapprove of this connection, and to a degree that might seriously affect his fortune; he, therefore, in his letters to Miss Gordon, repeatedly enjoined this obligation of the strictest secrecy, and she observed it even to the extent of making no communication of their mutual engagements to her father's family, though the attachment and intercourse founded upon it did not pass unobserved by one of her sisters, and also by the servants, who suspected that there were secret ties, and that they were already or soon would be married.

. . . It appears that they were in the habit of having clandestine nocturnal interviews both at Edinburgh and Braid, to which frequent allusions are made in their letters. One of the most remarkable of these nocturnal interviews passed on the 6th of July, at Edinburgh, where she was left alone with two or three servants. . . . There is proof enough to establish the fact, in my opinion, that he remained with her the whole of that night. He continued to write letters of a passionate and even conjugal import, and to pay nocturnal visits during the whole of his stay in Scotland, but there was no cohabitation of a more visible kind, nor any habit and repute, as far as appears, but what existed in the surmises of the servants and the sister. His stay in that country was shortened by his father, who came down, alarmed, as it should seem, by the report of what was going on, and removed him to England on or about the 21st of July. . . . In England he continued till 1805, when he sailed for Malta. His last letter, written on the eve of his departure, re-inforces his injunctions of secrecy, and conjures her to withhold all credit from reports that

might reach her of any transfer of his affections to another. . . . He continued abroad till May, 1808, with the exception of a month or two in the autumn of 1806, when he returned for a purpose unconnected with this history, unknown to his father, and, as it appears, to this lady.

“It is upon this occasion that the alteration of his affections first discloses itself, in conversation with a Mr. Hawkins, a friend of his family, to whom he gives some account of the connection which he had formed with Miss Gordon in Scotland, complains of the consequences of it, in being tormented with letters from her, which he was resolved never to read in the future, and having reason to fear that she would write others to his father, he requested Mr. Hawkins to use all means of intercepting any letters which she might write to the one or the other.

“Mr. Hawkins executed his commission by intercepting many letters so addressed, though in consequence of her extreme importunity he forwarded two or three of those addressed to Mr. Dalrymple; and he at length wrote to her himself about the end of 1806, or the beginning of 1807, and strongly urged her to desist from troubling General Dalrymple with letters. This led to a correspondence between her and Mr. Hawkins; and it was not till the death of Mr. Dalrymple's father (which happened in the spring of the year 1807) that she asserted her marriage rights and furnished him with copies of these important papers, which she denominates, according to the style of the law of Scotland, her “marriage lines.” She took no steps to enforce her rights by any process of law. Upon

the unlooked-for return of Mr. Dalrymple, some time in the latter part of May, 1808, he immediately visited Mr. Hawkins, who communicated what had passed by letter between himself and Miss Gordon, and suffered him, though not without reluctance, to possess himself of two of her letters, which Mr. Dalrymple has exhibited. Mr. Hawkins, however, dismissed him with the most anxious advice to adhere to the connection he had formed, and by no means attempt to involve any other female in the misery that must attend any new matrimonial connection.

“ ‘Within a very few days afterwards Mr. Dalrymple marries Miss Laura Manners in the most formal and regular manner. Miss Gordon, who had before heard some reports of no very definite nature, instantly, upon hearing authentic news of this event, takes measures for enforcing her rights, and being informed that he is amenable only to this jurisdiction, she immediately applies for its aid to enforce the performance of what she considers as a marriage contract.

“ ‘The case has proceeded regularly on both sides, and has been instructed with a large mass of evidence, much of it replete with legal eruditions, for which the court has to acknowledge great obligations to the gentlemen who have been examined in Scotland. It has also been argued with great industry and ability by the counsel on both sides, and now stands for final judgment. Being argued in an English court, it must be adjudicated according to the principles of English law applicable to such cases. But the only principle applicable to such a case by the law of England is, that the validity of Miss Gordon's marriage

rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. . . . The law learning of Scotland has been copiously transmitted, the facts of the case are examinable on principles common to the laws of both countries, and, indeed, to all systems of law. It is described as an advantage lost that Miss Manners, the lady of the second marriage, is not here made a party to the suit; she might have been made so in point of form, if she had chosen to intervene; in substance she is, for her marriage is distinctly pleaded and proven, and is as much, therefore, under the attention and under the protection of the court, as if she were formally a party to the question respecting the validity of her marriage, which is, in effect, to decide upon the validity of her own.

“*For I take it to be a position beyond the reach of all argument and contradiction, that if the Scotch marriage be legally good, the second or English marriage must be legally bad.* Another advantage intimated to be lost *is this*, that the Native Forum would have compelled the *production of her letters to him* for the purpose of seeing whether anything in them favored *his interpretation* of the *transaction*. Surely, according to any mode of proceeding, there can be no need of a compulsory process to extract them from the persons in whose possession they must be, if they exist at all. If they contain such matter as would favor such an interpretation, he must be eager to produce them, for they would constitute his defense. Not being produced, the necessary conclusion is either that they do not exist or that they contain nothing

which he could use with any advantage for such purpose.

. . . The marriage which is pleaded to be constituted by virtue of some or all of the facts, of which I have just given the outline, and to which I shall have occasion more particularly to advert in the course of my judgment, has been in the argument described as a clandestine and irregular marriage. It is certainly a private transaction between the individuals, but it does not of course follow that it is to be considered as a clandestine transaction in any ignominious meaning of the word, for it may be that the law of the country in which the transaction took place may contemplate private marriages with as much countenance and favor as it does the most public. It depends likewise entirely upon the law of the country whether it is justly to be styled an irregular marriage.

“ ‘In some countries only one form of contracting marriages is acknowledged, as in our own, with the exception of particular indulgences to persons of certain religious persuasions; saving those exceptions, all marriages not celebrated according to the prescribed forms are mere nullities. There is and can be no such thing in this country as an irregular marriage. . . . What is the law of Scotland on this point?

“ ‘Marriage, being a contract, is, of course, consensual, for it is the essence of all contracts to be constituted by the consent of parties. *Concensus non concubitus facit matrimonium* is the maxim of the Roman civil law, is, in truth, the maxim of all law upon the subject, for the *concubitus* may take place for the mere gratification of the present appetite,

without a view to anything further, but a marriage must be something more; it must be an agreement of the parties looking to the *consortium vitæ*, and agreement, indeed, of parties capable of the *concubitus*, for though the *concubitus* itself will not constitute marriage, yet it is so far one of the essential duties for which the parties stipulate, that the incapacity of either party to satisfy that duty nullifies the contract. Marriage in its origin is a contract of natural law; it may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind. It is the parent, not the child, of civil society. In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil consequences.'"

"*Justice McKinsty*—At some time in your argument, not now, I would like to inquire as to whether you find any difference between the law of Scotland and the common law of England?"

"*Mr. Terry*—No, sir; in this case, the same case, Lord Stowell says that they were the same until the Act of 26 of George II., which made all marriages illegal unless regularly performed, except in the cases of some of the dissenting sect. After the 26 of George II., Lord Stowell says there can be no irregular marriages in England. But the people of the United States did not bring the statutes of George II. with them when they left England for America. The Legislature of California in 1850 did not adopt the statutes of George II., but the common law of England, and that is the rule of decision in our country

where it is not contravened by any provision of the Federal Constitution, or our constitution or statutes."

"*Justice McKinstry*—In that same case it lays down the law as being the same prior to that statute."

"*Mr. Terry*—Yes, sir. In this same case the proposition is laid down and the authorities given for it, and I challenge the production of any authority to the contrary—and the authorities are Lord Cork and Lord Holt—that up to the time of the passage of the Act of the 26 of George II., the marriage by words present in England was as valid as if it had been solemnized by the Archbishop of Canterbury."

"*Justice Thornton*—Did not some question come before the House of Lords in the case of *Queen vs. Millis*?"

"*Mr. Terry*—Yes, sir; the same question came before the House of Lords in the famous Bredalbane case, *Campbell vs. Campbell*, reported in the first House of Lords, and I have that case here."

"'In most civilized countries, acting under a sense of the force of social obligations, it has had the sanction of religious paper added. It then becomes a religious as well as a natural and civil contract, for it is a great mistake to suppose because it is the one, therefore it may not likewise be the others. Heaven itself is made a party to the contract, and the consent of the individuals, pledged to each other, is ratified and consecrated by a vow to God. It was natural that such a contract should, under the religious system which prevailed in Europe, for under ecclesiastical notice and cognizance with respect both to its theological and its legal construction, though it is not un-

worthy of remark that amidst the manifold ritual provisions made by the divine Lawgiver of the Jews for various offices and transactions of life, there is no ceremony prescribed for the celebration of marriage. In the Christian, marriage was elevated to the dignity of a sacrament in consequence of its divine institution and of some expressions of high and mysterious import respecting it contained in the sacred writings. The law of the church, the canon law (a system which, in spite of its absurd pretensions to a higher origin, is in many of its provisions deeply enough founded in the wisdom of man), although in conformity to the prevailing theological opinion it revered marriage as a sacrament, still so far respected its natural and civil origin as to consider that where the natural and civil contract was formed it had the full essence of matrimony without the intervention of a priest; it had even in that state the character of a sacrament, for it is a misapprehension to suppose that this intervention was required as a matter of necessity, even for that purpose, before the Council of Trent. It appears from the histories of that council, as well as from many other authorities, that this was the state of the earlier law, till that council passed its decree for the reformation of marriages. The consent of two parties, expressed in words of present mutual acceptance, constituted an actual and legal marriage. . . . Such was the state of the canon law, the known basis of the matrimonial law of Europe.

“‘At the Reformation this country disclaimed, amongst other opinions of the Romish Church, the doctrine of a sacrament in marriage, though still re-

taining the idea of its being of divine institution in its general origin, and on that account, as well as of the religious forms that were prescribed for its regular celebration as an holy estate, holy matrimony; but it likewise retained those rules of the canon law which had their foundation, not in the sacrament or in any religious view of the subject, but in the natural and civil contract of marriage.

“‘The Ecclesiastical Courts, therefore, which had the cognizance of matrimonial causes, enforced those rules; and amongst others, that rule which held an irregular marriage constituted *per verba de præsenti* not followed by any consummation shown, valid to the full extent of avoiding a subsequent regular marriage contracted with another person. (Brower, 1, 22, 12.) A statute passed in the reign of Henry VIII. (32 Hen. Cap. 38, sec. 2) proves the fact by reciting that many persons, after long continuance in matrimony without any allegation of either of the parties or any other at their marriage, why the same matrimony should not be good, just, and lawful, and after the same matrimony solemnized and consummated by carnal knowledge have, by an unjust law of the bishop of Rome, under pretense of a former contract made and not consummated by carnal copulation, been divorced separate, and then enacts that marriages solemnized in the face of the church and consummated with bodily knowledge, shall be deemed good, notwithstanding any pre-contract of matrimony not consummated with bodily knowledge which either or both of the parties shall have made. But this statute was afterwards repealed as having produced horrible mis-

chiefs, which are enumerated in very declamatory language in the preamble of the statute 2, Edward VI.; and Swinburne, speaking of the prevailing opinion of his time, applauds the repeal as worthily and in good reason enacted. The same doctrine is recognized by the temporal courts as the existing rule of the matrimonial law in this country in Bunting's case (4 Coke, 29). John Bunting, father of the plaintiff, and Agnes Adenshall contracted a marriage *per verba de præsenti*, and afterwards, on the 10th of December, 1555, the said Agnes took to husband Thomas Tweed, and afterwards, on the 9th of July, Bunting libeled against her in the Court of Audience. It was decreed that Agnes had been married to Bunting, and that the second marriage was illegal and void. In the later case of Collins and Jesson (3 Anne), it was said by Holt, chief justice, and agreed to by the whole bench, that if a contract be *per verba de præsenti* it amounts to an actual marriage which the very parties themselves cannot dissolve by release or other mutual agreement, for it is as much a marriage in the sight of God as if it had been in *facie ecclesiæ*. But a contract *per verba de futuro* which does not intimate an actual marriage, but refers to a future act, is releasable. (2 Salk. 437, Mod. 155.) In Wigmore's case, (2 Salk. 438), the same judge said a contract *per verba de præsenti* is a marriage; so is a contract *de futuro*, if the contract be executed and he take her, it is a marriage, and they cannot punish for fornication. In the Ecclesiastical Court the stream ran uniformly in that course. One of the most remarkable is that furnished by the diligence of De Swabey, on account of

its striking resemblance to the present case. I mean the case of Lord Fitzmaurice, son of the Earl of Kerry, Coram Deleg. in 1732. There were in that case, as in the present, three engagements in writing. The first was dated June 23, 1724, and contained these words: "We swear we will marry one another." The second was dated July 11, 1724, and was to this effect: "I take you for my wife and swear never to marry any other woman." This last contract was repeated in December of the same year. It was argued then, as here, that the iteration of the declaration proved that the parties did not depend upon their first declaration, and was, in effect, a disclaimer of it. But the court, composed of a full commission, paid no regard to the objection, and found for the marriage, and an application for commission of review founded upon new matter alleged was refused by the chancellor. Things continued upon this footing till the Marriage Act, in the twenty-sixth year of the reign of George II., chapter 33, described by Mr. Justice Blackstone, (book 1, chapter 15, sec. 3), "an innovation on our laws and constitution," swept away the whole subject of irregular marriages, together with all the learning belonging to it, by establishing the necessity of resorting to a public and regular form, without which the relation of husband and wife could not be contracted. . . .

"It may be convenient to consider, first, whether the present case is a case of promise, or of present declaration and acknowledgment. It will be convenient to do so in two respects. The first convenience attending it is that the fact itself is determinable

enough upon the face of written existing instruments. It is not to be gathered from the loose recollections of loose verbal declarations, not guarded either in the expressions of those who made them or in the memory of those who attest them. The second convenience resulting from it is that a large portion of the inquiry into the other points of the case may in a degree be rendered superfluous, for if these papers contain mere promises, then have I to consider only the law of promise as referable to cases accompanied or unaccompanied by a *copula*, leaving out entirely the law that respects acknowledgments and declarations. On the other hand, if they are to be considered as acknowledgments, then the law of promise may be dismissed, except, perhaps, sometimes to be introduced incidentally for purposes of occasional illustration. Whether they are to be considered as promises or declarations must be determined upon the contents of the instruments themselves, on such a view as the plain meaning of the words imports, and upon the information of their technical meaning as communicated by the Scotch lawyers, for it is possible that they may be subject to a technical construction different from their obvious meaning. This is the marriage settlement of Scotland. The words of the *stipulatio sponsalia* are present declaratory words; the parties mutually accept each other, but the engagements they enter into are always technically considered to be mere promises *de futuro*. Those who are conversant in the books of the canon law will recollect the extremely nice distinctions which that law and its commentators have made between expressions of a very similar import in

their obvious meaning, as constituting contracts *de præsenti*, or only promises *de futuro*. The first paper is without date, and is merely a promise. Mr. Dalrymple promises to marry Miss Gordon as soon as it is in his power, and she promises the same; it is superscribed by both their names, is indorsed "a sacred promise," and is left in her possession. It is pleaded to be the first that was executed by them, and it is highly reasonable to presume that it was so, for no person, I think, would be content to accept such a paper as this, after having received the papers which follow, marked 2 and 10. The paper marked No. 2 is dated on the twenty-eighth day of May, 1804, and contains these words: "I hereby declare Johanna Gordon is my lawful wife; and I hereby acknowledge John Henry Dalrymple as my lawful husband." I see no great difference between the expressions declare and acknowledge. The words properly enough belong to the parties by whom they are respectively used, and are, perhaps, not improperly adopted to the decorums of such a transaction between the sexes. No. 10 is a reiterated declaration on the part of Mr. Dalrymple, accompanied with a promise "that he will acknowledge Miss Gordon as his lawful wife the moment he has it in his power." She makes no repeated declaration, but "promises that nothing but the greatest necessity (necessity which . . . situation alone can justify) shall ever force her to declare this marriage." It is signed by him and by her, describing herself J. Gordon, now J. Dalrymple, and it is dated July 14, 1804. Both the papers are inclosed in an envelope, on which is inscribed "sacred promises and engagements." There

are promises and engagements that would satisfy these terms, independent of the words which contain the declaration of the marriage. At the same time it is to be observed that the words "promises and engagements" are not improperly applied to the marriage vow itself, which is prospective in its duties, which engages for the performance of future offices between the parties till death shall part them, and to which, in the words of our liturgy, it plights their troth, or, in more modern language, pledges their good faith for that future performance. I feel some hesitation in acceding to the remark that the paper marked No. 2 is at all weakened or thrown loose by the mere engagement of secrecy, which seems to be the principal if not the sole object of the latter paper, though Mr. Dalrymple has thrown in a renewed declaration of his marriage. That reiterated declaration, though accompanied with a promise of secrecy, cannot, upon any view of the case, be considered as a disclaimer of the former. An engagement of secrecy is perfectly consistent with the most valid, and even with the most regular marriages. It frequently exists even in them for prudential reasons, from the same motives it almost always does in private or clandestine marriages. It is only an evidence against the existence of a marriage when no such prudential reasons can be assigned for it, and where everything arising from the very nature of marriage, calls for its publication.

"Such is the nature of these exhibits, first, a promise; secondly, that promise merged in the direct acknowledgment of the accomplished fact; thirdly, a

renewed admission of the fact on his side, with a mutual engagement of secrecy, till the proper time for disclosure should arrive.

“ ‘In these papers as set up by Miss Gordon, resides the constitution, as some of the gentlemen who have been examined call it, or as others of them term it, the evidence of the marriage, for it is a matter of dispute between these learned persons whether such papers, when free from all impeachment, are constituents or merely evidence of marriages. It appears to be a distinction not very material in its effects, because if it is to be considered that such papers so qualified are only to be treated as evidence, yet if free from all possible impeachments on the grounds on which the law allows them as evidences to be impeached, they make full faith of the marriage, they sustain it as effectually as if, according to other ideas, they directly constituted it; they have then become presumptions *juris et de jure*, which establish the same conclusion, although in another way.

“ ‘With regard to decided cases I must observe, generally, that very few are to be found in any administration of law in any country upon acknowledged and settled rules. Such rules are not controverted by litigation; they are therefore not evidence by direct decision; they are found in the maxims and rules of books of text law. It would be difficult, for instance, to find an English case in which it was directly decided that the heir takes the real and the executor the personal estate; yet though nothing can be more certain, it is only incidentally and obiter that such a matter can force itself upon any recorded observation of a court.

Equally difficult would it be to find a litigated case in the canon law establishing the doctrine that a contract *per verba de præsenti* is a present marriage, though none is more deeply radicated in that law. . . .

“ ‘I think that, being compelled to pronounce a judgment upon this point, I am bound to say that I entertain as confident an opinion as it becomes me to do, that the rule of the law of Scotland remains unshaken, that the contract *de præsenti* does not require consummation in order to become “very matrimony;” that it does *ipso facto et ipso jure*, constitute the relation of man and wife. . . . What was the state of mind and conduct of the lady during this period of time? It is not to be presumed, from the contents of his letters, that she was either indifferent or repulsive.

“ ‘This imputation, indeed, that has been thrown upon her is of a very different kind, that she was an acute and active female, who, with a knowledge of the laws of the country, which Mr. Dalrymple did not possess, was endeavoring *quacunque via data*, to engage him in a marriage. To this marriage she has inflexibly adhered, and now stands upon it before this court. So that whatever might be the real state of her affections toward this gentleman (which can be known only by herself), this, at least, must be granted, that she was most sincerely desirous of this marriage connection, which marriage connection both of them perfectly well knew could not be publicly and regularly obtained. Taking, then, into consideration these dispositions of the parties, his desire to obtain the enjoyment of her person on the one hand, and her solicitude to obtain a marriage on the other, which, after

the delivery of such instruments, she knew might at all events be effectually and honorably obtained by the mere surrender of her person, what is the probable consequence? In this part of the island the same circumstances would not induce the probability of a private surrender because a public ceremony being here indispensably required, no young woman acting with regard to virtue and character and common prudence, would surrender her person in a way which would not only not constitute a marriage, but would, in all probability, defeat all expectations of such an event.

“ ‘In Scotland the case is very different, because in that country, if there are circumstances which require the marriage to be kept a secret, the woman, after such private declarations passed, carries her virgin honors to the private nuptial bed, with as much purity of mind and person, with as little violation of delicacy, and with as little loss of reputation, as if the matter was graced with all the sanctities of religion. It is in vain to talk of criminality, and of grossness, and of gross ideas. In such a case there are no other ideas excited than such as belong to matrimonial intercourse.

“ ‘It is the “bed undefiled,” according to the notions of that country; it is the actual ceremony as well as the substance of the marriage. It is the conversion of the lover into the husband, *transit in matrimonium*, if it was not *matrimonium* before.’

“I read from page 522: ‘Little now remains for me but to pronounce the formal sentence of the court, and it is impossible for me to concede from my own ob-

servation the distress which that sentence may eventually inflict upon one or perhaps more individuals, but the court must discharge its public duty, however painful to the feelings of others and possibly to its own, and I think I discharge that duty in pronouncing that Miss Gordon is the legal wife of John William Henry Dalrymple, Esq., and that he, in obedience to the law, is bound to receive her home in that character, and to treat her with conjugal affection, and to certify to this court that he has so done by the first session of the next term.'

"In that case there was an injunction of secrecy which was kept for four years. I have read that case extensively, because in many of its circumstances it is exactly similar to the one at the bar. Now, I say that no case can be found in any book of the law—no text can be found in any law writer—which goes to the effect that a promise of secrecy avoids a marriage or renders it less valid than it would be without it. It may—if there is no reason given for the observance of secrecy—it may somewhat affect the proof. It may require stronger proof of the actual contract than if no such secrecy was indulged."

After citing the case of Dr. Hamilton and Mary Clark, of Edinburgh, Mr. Terry says:—

"It is necessary in all actions for divorce to establish a valid marriage; and the defendant having denied in the answer the genuineness and due execution of the written contract, that question was the main issue on the trial, and this issue was found in favor of the plaintiff.

"It is not contended by any of the counsel for the

defendant that the paper set out in the findings would not be valid and binding if it did not contain an agreement by one of the parties that its existence should not be made known for two years, without the consent of the other party to the contract.

“But it is contended that this agreement of secrecy is violative of the policy of the law, and renders the contract void.

“No authority has been produced in support of this proposition; and I think that no authority can be found which declares that a contract otherwise legal and valid is rendered void by the fact that the parties agreed that its existence should be kept secret for a specified time, or until both parties consented to its publication.

“The argument is that the contract of marriage is one in which the public is interested; ‘in which public morality and decency is concerned,’ and which the law-making power has always undertaken to control and direct and govern by legislative conditions; and that as the State has provided for the obtaining of a marriage license, and the making and recording of a certificate of marriage, the policy of the law requires that marriages should be public; that there should be record evidence of the fact, and that every agreement to keep such contracts secret is against the policy of the law and renders the contract void.

“I do not understand that an agreement to do a lawful act is against public policy because it is not executed in the form prescribed by law. I understand that a contract against the policy of the law is a contract to do some act prohibited either expressly or impliedly

by law, or to abstain from doing something required by law. That is the object, not the form of the contract, which makes it void as against the policy of the law. (Civil code, section 1596.)

“A contract of marriage between two individuals of opposite sexes, capable of contracting marriage with each other, is not opposed to the policy of the law. On the contrary, such contracts are favored by the laws of all civilized countries.

“If it be admitted that the agreement on the part of the plaintiff not to make known the existence of the contract for two years without the consent of the defendant is against the policy of the law, this fact does not affect the validity of the marriage.

“The contract found by the court below to have been executed by the parties had two distinct objects: one, the entering into the marriage relation; the other, the keeping secret that relation for two years.

“‘The object of a contract is the thing which it is agreed on the part of the party receiving the consideration to do or not do.’ In consideration of the agreement of defendant to take plaintiff as his wife, plaintiff agreed to take the defendant as her husband, and not to make known the contracts or existence of the writing for two years.

“One of the objects of this contract was lawful. It was lawful and not against the policy of any law for the plaintiff and defendant to enter into the marriage relation with each other. If we admit that the second object, the keeping the relation secret, was against public policy, what is the result? This question is answered by the statute law of California:—

“‘When a contract has several distinct objects, of

which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter, and valid as to the rest.'

" 'An agreement to keep the marriage secret will not invalidate it, neither necessarily involve in doubt the proofs of its existence.' "

In this extraordinary argument, Judge Terry cited the laws that have existed in regard to marriage, and every case of record since the reformation, and it is one of the most complete treatises on the question of marriage ever produced. It occupies one hundred and seventy-eight pages of a brief.

CHAPTER XLIV.

TERRY'S ESTIMATE OF FIELD—THE HEYDENFELDT INTERVIEW—HEYDENFELDT'S DENIAL—CONDITION OF TERRY'S MIND AFTER IMPRISONMENT—SHADOWED BY PAID DETECTIVES IN THE SECRET SERVICE.

The intimation given in Judge Terry's letter to Judge Heydenfeldt that Field probably wanted to get even on him by the excessive imprisonment for his refusal to assist him in his presidential aspirations, provoked a question of veracity between the two gentlemen by the persistence with which Judge Field denied having anything to do with Terry, or that he was seeking the indorsement of the Democracy of the State when the convention assembled at Stockton in 1884. Terry's letter to a friend at the time gave the facts of the case, and no such letter would ever have been written had not the facts existed, as there was no occasion for any personal enmity between him and Field at the time it was written. To this friend he wrote as follows:—

“In March, 1884, I was called, by invitation, at Judge Heydenfeldt's office, and he stated that he had received a letter from Judge Field, who was anxious to receive the presidential nomination, and thought he could do so if he had the indorsement of California in

the State convention; that if nominated he could carry New York; that he had been informed by Californians in Washington that I was the only man who could secure for him the delegation; also, that Field believed that I wanted political recognition, and that if he (Field) was elected he would give me anything I desired. I replied that Judge Field and his friends very much overrated my influence; that I could not give him the California delegation; and if I could I would not, as his judicial record would absolutely prevent my giving him my support; that no place in the records of his decisions could it be found that he had ever given a judgment for a poor man against a rich one, no matter what the evidence."

These men having been associated on the Supreme Bench, it was very natural that they should confer with one another on matters where either party was personally interested, and the fact that Judge Field did present his claims to that convention for recognition, and that his advocates and supporters were snubbed at every point by the anti-monopoly element, led by Delmas of San Francisco, and backed by Judge Terry, who was not a delegate, is proof sufficient that the interview with Heydenfeldt could not be disputed. The question came up at the time of Terry's death, and having been removed beyond reach of evidence, Judge Heydenfeldt, willing to do homage to a living power, or suffering by softening of the brain, denied the interview. It is needless to say, however, that there are but few men living who do not believe the statement made by Judge Terry. In the interview, Terry further said, as he testified to an attorney at

Fresno, Hon. L. B. McWhirter, that he "considered Field, in ability and corruption, the equal of Francis Bacon, and that it would be a sad day for the country if such a man were ever President."

There is no question but that Judge Field believed that Judge Terry had said just what he was credited with having said, and that his pride and ambition were wounded by it, but whether this thought entered into the degree of punishment inflicted for contempt is a question of doubt.

After his term of imprisonment was ended, Judge Terry made his residence in Fresno, where his interests mostly were, and where he had a comfortable home. His legal business was confined mostly to the San Joaquin Valley counties, and where he was best known he was most highly respected. He was almost invariably retained as an attorney on all important cases, but more especially where large interests were involved. He was not a criminal lawyer, and did not care to engage in any criminal practice, for the reason, as he often expressed it, that he hated to defend a man who was guilty, and there were but few of any other kind brought before the courts. He had invested largely in real estate in connection with others and had before him a prosperous future. He finally formed a copartnership in the legal profession with W. D. Grady and Herbert Z. Austin, the former having been associated with him for several years previous to his imprisonment for contempt. He continued in his practice apparently indifferent to the past and its exciting scenes, but it was noticeable that he was not the same man in his associations with business men. At

all times and on all occasions in former years he was considered the soul of honor; a man whose word was as good as his bond, and whose judgment in matters of business was never at fault. Some of his most ardent friends and admirers, who were close to him in business, began to suspect that his mind was too heavily charged with the thought of the wrong and indignity inflicted upon him, and understanding fully the condition of his social relations, tried to reason with him. A banker in Fresno, who knew him well, and who placed a proper value upon his integrity, approached him with the intention of securing a promise from him not to seek an altercation with Field. He said:—

“Judge, this matter is all over with now. You have not suffered any in the eyes of your friends. You have fine prospects ahead and valuable property to take care of. Why not let the past go and forget it as much as you can. You know the people are your friends, and that they have no sympathy with Judge Field. Let the matter rest where it is and don’t seek an encounter with any of the judges.”

Terry’s answer was: “I do not intend to injure Field bodily, but if the opportunity presents itself, while I shall not seek it, I shall slap him in the face or horsewhip him. I have made up my mind to that and nothing can alter my determination.” This was merely a repetition of what he had threatened on other occasions, and it was useless for any man to try to exact a promise from him of milder treatment. In several small business transactions he became involved in trouble, and on one occasion had a personal encounter with a business man in a dispute over a small bill con-

tracted by his wife. He was not in the habit of contracting small debts, and, in fact, there was nothing small about him. On several occasions he made representations in regard to business matters which proved incorrect and which surprised him when made acquainted with the facts, but, with the exception of one or two minor instances, he was always prompt in correcting them. This change in his dealings with his fellow-men was foreign to his nature, and pointed unmistakably to the fact that he was laboring under a strong mental pressure of some kind, and the Alameda County Jail, and the six months' imprisonment for contempt at the instance of Judge Field was the only solution.

During the six months following his release he had conducted many important cases before the courts, and instead of injuring his business, it was largely increased, and the only cloud that was hanging over his head, aside from the judicial indignity, was the social ostracism that seemed to continue, and would yield to no kindly or beneficent act of his own. He did not cease to perform acts of kindness to the poor, and many can testify to his generosity. One woman who was too poor to pay a lawyer, and who had been refused counsel by others, went to Judge Terry and related her case. She wished to be divorced from a worthless husband. She had been refused counsel, and he said to her, "I will attend to your case, and if you need any money I will let you have it." He secured her a divorce and also her prayers. It seemed to lighten his burden to take burdens from the shoulders of others, but he never ceased to brood over the

“spite work” which he denominated the act of Judge Field.

On one occasion, as Judge and Mrs. Terry were on their way from Los Angeles, where he had been attending the session of the United States Circuit Court, they happened upon the same train on which Judge Lorenzo Sawyer was. During the trip, Mrs. Terry assaulted Judge Sawyer by pulling his hair. This act was witnessed by one of the superior judges of Los Angeles, who was a passenger on the train, and it was reported to the authorities at Washington and noted in connection with other threats which had been made against Field and Sawyer.

These threats having been presented by responsible parties, and no denial having been made, constituted the sum and substance of the measures taken to protect the members of the Federal judiciary from any injury, and had this been all there would have been no such tragedy as that which resulted. A deep-planned and well-organized scheme was concocted in some corner of the world to make it a finality. Detectives were employed by someone through a San Francisco agency to shadow the Terrys in secret. One of these detectives visited Fresno in the month of June, 1889. He telegraphed from Sacramento to John A. Barker, city marshal of Fresno and chief of police, inquiring if the Terrys were there, and signed his name “George Osborne.” As Judge Terry’s services were in constant demand all over the State, Mr. Barker supposed it was from someone who desired to retain him in a suit at law, and he answered the dispatch, stating that Terry was at home. Two days thereafter the marshal was ap-

proached by a young man, who was a stranger to him, who inquired if he was the chief of police, and being told that he was, he asked for a consultation with him in private. They went into a room in the rear of a saloon near by and he informed Mr. Barker that he was the person who telegraphed him with regard to the Terrys, that his real name was Henry Felton, and that he was a secret detective under the orders of Finnegass' Detective Agency of San Francisco for the purpose of shadowing the Terrys, and he desired to enlist his services. "There's big money in it," said he. Mr. Barker informed him that he was a friend of Judge Terry's and he must decline to aid him in any such business, but as he was professionally bound he would not divulge the nature of his business nor the cause of his presence.

The young man made his headquarters at the Grand Central Hotel and was very diligent in visiting the neighborhood of the Terry residence daily. He seemed to have plenty of money, and spent it freely. When Terry would take the train for any of the neighboring towns, which he frequently did to attend the various courts, Felton would take the same train, always returning when Terry did. He occasionally drank pretty freely, and would become rather communicative. On one occasion, while riding out with the marshal, he said that Judge Terry was "coppered" at every point, and that if he ever made any violent demonstrations he would be killed; or, as he expressed it in slang style, "Terry wouldn't be in it."

The evening before the murder, Barker met the detective and said: "Young man, you have got a

ticklish job on your hands. Do you know that if Judge Terry found out that you were here dogging his footsteps, following him around, and telegraphing his movements, he would come down and beat you to death some morning?"

"No, he wouldn't," answered Felton. "Whenever I am in Judge Terry's presence, I have my hand on my gun. All of us are fixed for him, and if he ever makes a break we will take no chances."

Felton was at the depot the night Mr. and Mrs. Terry took the train, but he had been drinking, and did not see them get aboard. The next morning the marshal was the first one to notify him of the tragedy. He was perfectly astounded and did not believe it, but when assured of the fact, he said, "My God, I will lose my position!"

CHAPTER XLV.

MEASURES TAKEN TO PROTECT THE JUDICIARY—THE ATTORNEY-GENERAL'S LETTER TO MARSHAL FRANKS—TERRY TO BE KEPT IN IGNORANCE—FIELD AND TERRY MEET AT LATHROP—TERRY SLAPS HIM IN THE FACE—FIELD'S BODYGUARD KILLS TERRY—HE IS ARRESTED AND TAKEN TO STOCKTON.

In July, 1889, Hon. Stephen J. Field, of the United States Supreme Court, again visited the Pacific Coast to hold a term in the Ninth Circuit. His friends in the East advised him not to do so, but he persisted in his determination, although the evidences had accumulated in the department of justice that Judge Terry had threatened on several occasions to assault him, and that even his life was in danger. There were several charges against Judge Terry to be disposed of, and he must necessarily come in contact with him in their disposition. In the meantime, the political complexion of the administration had been changed, and Wm. H. Miller was the attorney-general. The previous conduct of Judge and Mrs. Terry had become familiar to him through the letters and affidavits on file, and he was a stranger to the true character of the man. All he knew was of a violent character, and he was only impressed with the

evidence that he was a desperado. He was made aware of the fact that Terry never made idle threats, and was fully aware of the fact that it was his duty to protect the judiciary. Accordingly he wrote the following letter to the United States marshal:—

DEPARTMENT OF JUSTICE, }
Washington, D. C., April 27, 1889. }

JOHN C. FRANKS, U. S. MARSHAL, San Francisco, Cal.—
Sir: The proceedings which have heretofore been had in connection with the case of Mr. and Mrs. Terry in your United States Circuit Court have become matters of notoriety, and I deem it my duty to call your attention to the propriety of exercising unusual caution in case further proceedings shall be had in that case, for the protection of his honor, Justice Field, or whosoever may be called upon to hear and determine the matter. Of course I do not know what may be the feelings or purposes of Mr. and Mrs. Terry in the premises, but many things that have happened indicate that violence on their part is not impossible. It is due to the dignity and independence of the court and the character of its judges that no effort on the part of the government shall be spared to make them feel entirely safe and free from anxiety in the discharge of their duties.

You will understand, of course, that this letter is not for the public, but to put you on your guard. It will be proper for you to show it to the district attorney, if deemed best.

W. H. MILLER, *Attorney-General.*

Letters passed between the United States district attorney and the attorney-general, which finally resulted in an order instructing the United States marshal to provide a bodyguard to protect Justice Stephen J. Field during his sojourn on the Pacific Coast from threatened assaults and insults by Judge Terry. Sufficient evidence had accumulated to make these precautionary measures necessary, and the greatest

secrecy was observed in order to prevent Terry from being provided with any knowledge of their existence. The detectives were carefully distributed and instructed to make accurate observations of Terry's movements, and in case of any demonstrations, to see that he was placed beyond the power of doing any harm to the distinguished jurists.

In a thorough and impartial investigation of this important matter, there can be found no record of any measures having been taken to advise Judge Terry of the fact that the contemplated assault would be considered a violent breach of the peace, and one which the law would not recognize as justifiable under the circumstances. No action was taken to protect Justice Field by staying the hand of the avenger in a manner prescribed by law, such as Justice Field would have intervened between Terry and Broderick had he been present at the time of the duel. It will always be a question that, if there was sufficient information in the way of evidence to provide against an attack, and there probably was, was not that same evidence sufficient to stay the hand by having it bound by the legal process provided by the statutes? It would be an insult to the judiciary to charge them with ignorance in such matters, and not to do so can only be classed under the broad charge of criminal negligence. The fact that a system of espionage was instituted, and armed forces placed in ambush with orders not to divulge their presence or their intentions and to allow no chances to be taken, has upon its face a most remarkable species of humane engineering by the authorities in their strides to a "higher civiliza-

tion." It has all the veins, dips, angles and spurs of cunningly-conceived and well-planned conspiracy against the life of a man whose presence was a constant menace to some high-handed scheme to do a criminal act. Justice Field seemed to be unable or unwilling to suggest the remedy, although he was personally aware of the desperate character of Judge Terry in combating with the power that had placed its heel upon his neck. It was not merely a matter of record; it was one of personal knowledge, and having the power and the authority to take the necessary legal steps, which the evidence would have justified him in doing, he should have done so and protected himself from humiliation and saved a human life. That other and more potent influences than that of care for humanity and peace were at work, can only be accepted as a correct solution of the question.

In the absence of all legal safeguards, and in conformity with the wishes of those opposed to Judge Terry and the orders of the attorney-general, Marshal Franks appointed David Neagle a deputy United States marshal, and assigned him to the position of bodyguard to Justice Field during his sojourn on the Pacific Coast. Neagle had the reputation of being a rash, brave man, having figured as a hero in Arizona among the "toughs" of that Territory who have given it an unenviable notoriety. He had also gained some notoriety in San Francisco among the politicians. He accepted the position and accompanied Justice Field to Los Angeles on the tenth day of August, 1889, where Field held court in connection with Judge Ross. On the 14th of August, Field left Los Angeles

for San Francisco with Neagle. As the train passed Fresno Judge and Mrs. Terry went aboard for the purpose of being present at the hearing of the cases against them in the Circuit Court. They were not aware of the presence of Judge Field on the train, believing he had passed through the day before. The train passed Fresno at 2:30 A. M., and there being no vacant room in the sleeping car, Judge and Mrs. Terry took seats in a regular passenger car. Neagle was on the alert and saw the Terrys when they took the train. He immediately informed Justice Field of the fact, and when the train arrived at Merced he telegraphed for an officer to be on hand in case trouble should occur.

When Judge Terry was at the depot at Fresno just before the train arrived, his former partner, W. D. Grady, handed him a pistol, saying, "Take this, judge, you may need it." "No," said the judge, "I have no use for a pistol; I never carry one." "Well," said Grady, "I want you to take it; you may need it, for I feel as though I would never see you again." Terry took the pistol and gave it to his wife just as they stepped aboard the train.

At Modesto, Sheriff R. B. Purvis took the train, but not at the suggestion of Neagle, or having in his keeping the fact of the presence of the parties upon whom so much anxiety was centered. The train stopped at Lathrop for breakfast, and Justice Field, although having been made aware of the presence of Judge and Mrs. Terry, and having been warned by Neagle, who proposed having breakfast served in the buffet, concluded to take breakfast at the station, re-

marking that he had eaten at the station before and had gotten a good meal.

He left the car, and, in company with his body-guard, was taken to a seat at a table near the center of the dining room, facing toward the door. The dining room is quite large, having three rows of five tables in each row. Field occupied a chair at the corner of the third table in the middle row, and Neagle next on his left. Soon after they were seated Judge and Mrs. Terry entered, and the steward showed them to seats at a table at the rear end of the dining room in the same row. In going to this table they passed down the aisle in front of Justice Field. Terry did not observe Field as he passed, but Mrs. Terry saw him, and, without taking a seat, she spoke to her husband in an undertone and, turning quickly about, passed out of the dining room toward the cars.

Observing these movements T. M. Stackpole, one of the proprietors of the station eating house, knowing all the parties and the bitter feud existing between the Terrys and Justice Field, and also the vindictive and irrepressible character of Mrs. Terry, walked to where Judge Terry was sitting, and said: "Mr. Terry, I hope Mrs. Terry will not be so indiscreet as to create a disturbance in the dining room."

Judge Terry, who was up till this time unconscious of the presence of Justice Field, inquired what he meant.

"Justice Field is in the room," he replied, "and I feared Mrs. Terry would create a disturbance, as she has gone out to the car for some purpose. Do you think she will do so?"

"I think it very likely," replied Terry. "You had better watch her at the door and prevent her from again entering the room."

Mr. Stackpole did as Terry suggested, and placed two men at the door to intercept Mrs. Terry, should she again seek to enter the dining room, and as he walked to his place at the door, leading from the dining room to the barroom, Judge Terry arose from his seat and walked toward the door as though he were following his wife, but down the other aisle to the rear of Judge Field. His cool and deliberate manner was such that no one supposed that he meditated any disturbance, and even Neagle, who was on the alert, did not realize that he was about to make an assault on Field. He passed Neagle, but when he arrived at a point immediately behind Field, he stopped, turned about, and stooping down over him, deliberately struck him on the right cheek with the palm of his hand, and then quickly struck with his left hand, which hit Field on the side of the head, as he had turned his head to look up. Neagle was quick to act, and without rising from his seat, drew his pistol with his left hand, holding the barrel in his right to be sure of his aim, shot Terry, inflicting a mortal wound. He then arose and fired a second shot accompanied with the word "Hold," and the ball passed through his left ear as he was in the act of falling to the floor. The first shot had done its deadly work, and yet the strong, robust frame did not yield until Terry had raised his arm with clenched fist and an avenging expression on his features, to strike down the assassin, but his power had gone with the bullet that had entered his heart.



JUDGE TERRY SLAPS JUSTICE FIELD IN THE FACE AND IS SHOT DEAD BY DEPUTY MARSHAL NEAGLE, AT LATHROP,
AUGUST 14, 1884. TERRY SAT AT THE EAST END OF THE FIFTH TABLE, SAME ROW.

Neagle had no time to argue the case or to warn Terry that he was an officer who had been hired to kill him, as the report was and as the records have it. The moments were too precious and the chances too great. There was no time for thought and but little time for action. It was a supreme moment for him and he utilized it.

Terry fell to the floor with one leg doubled under him, and expired in less than two minutes. While the sound of the pistol shots were ringing there was a crowd at the door wrestling with Mrs. Terry, in their attempts to take a satchel from her, and in doing so it was accidentally opened and a pistol dropped from it to the floor. All was confusion. There were about fifty persons in the room at the time eating breakfast, one-half of whom were women, and all striving to get out at the doors.

As soon as Judge Terry fell to the floor, Sheriff Purvis, who was in the adjoining room and had witnessed the shooting, came in and stooped over the body. He saw he was dying, and he stepped aside as Mrs. Terry came rushing to the body of her husband, kneeled over it and raved piteously. She besought him to speak to her and he opened his eyes and their lips met in a last kiss. She turned about and said, "They have killed the only friend I had on earth," and called upon those present to avenge his death, charging Field and Neagle with the crime of murder.

A few had gathered about Neagle, who stood at the west end of the room, with the smoking pistol in his hand, declaring that he was a United States officer. "I killed him and I did no more than my duty," he

said, "and I defy anybody to touch me." "Yes," said Field, "that man assaulted me, and my officer shot him."

This expression from the venerable-looking gentleman assigning his official position, attracted the attention of the people, who had become excited at the killing of a human being, and allayed somewhat the feeling that existed that Neagle should be arrested, and being for the first time cognizant of the fact that he was an officer under special orders, they ceased their efforts to arrest him. There was one man there, however, who appreciated the fact that, no matter whether authorized by the highest tribunal in the land, or the highest authority, a man had been killed, and whether justifiable or not, the arrest should be made, in justice to the man who committed the deed as well as in the eyes of the law.

While these scenes were transpiring, Mrs. Terry was dividing her attention between sorrowing over the dead body of her husband and seeking to provoke a mob spirit for vengeance on Field and Neagle. In the midst of the most intense excitement, Justice Field and Deputy Marshal Neagle passed out of the dining room and entered their car and were locked in by the conductor. Seeing this, Sheriff Purvis knocked at the door of the car, and informing them of his official standing, he was admitted. In demanding his arrest Field objected, but Neagle surrendered himself, and before the train pulled out, Constable Walker, of San Joaquin County, who had just arrived, was admitted. A hasty consultation was held, and it was thought best, owing to the excitement at

the station, to take Neagle to Tracy, a station ten or twelve miles west, and from there to Stockton, by private conveyance.

Judge Terry's body lay upon the floor during all this time, visited only by his wife and a few who were his friends while in life, and after the train moved off toward San Francisco, Mrs. Terry kneeled down by his side and yielded to her anguish of heart in the most tender and passionate language. She realized to its keenest depths the extent of her utter loneliness in view of all that had transpired during the past two years, and as though directing her thoughts in language to some particular person, she said:—

"Oh, if I could be in your place, my love!" she cried. "Oh, if I could be here in your place! If it was only I instead of you, who have so many to love you. Sweet, sweet lips, and he died for me. My God, my God, and he felt it so, too, to think that he was thrown into jail for protecting his wife. And if he hadn't protected me you would have called him a coward. If he could only have been sick, and you'd have had the satisfaction of caring for him. He was such a good, kind husband. Nobody ever had a better; nobody ever had a more loving husband. Oh, how can I give him up—my love! O my love, may God take your soul and protect you, and take you to his heavenly home!"

At this supreme moment of her anguish she no doubt felt the force of the remark that "when she married David S. Terry she sealed his death warrant," as was said by one of his old-time and most intimate friends. The Sharon divorce case was the dark valley of the shadow.

David Neagle was taken from Tracy to Stockton by Constable Walker, and he was there placed in jail for safe keeping until future proceedings could be had to determine his status as an actor in the exciting drama.

CHAPTER XLVI.

TERRY'S BODY TAKEN TO STOCKTON—EXCITEMENT
AMONG THE PEOPLE—FALSE ALARMS—A QUIET
FUNERAL—JUSTICE FIELD CHARGED WITH MURDER
—HIS ARMOR-BEARER—SHORT SKETCH OF THE
LIFE OF DAVID NEAGLE.

Judge Terry's body was taken charge of by the coroner of San Joaquin County and taken to Stockton on the same day, and Mrs. Terry accompanied it. Although the fame and merits of the man would have suggested that it lay in state, the peculiar circumstances surrounding his death suggested to the followers in the wake of a "higher civilization" that it might not be politic to allow such a thing, and his body was simply taken to the morgue, where an inquest was held. In the examination it was found that the bullet had passed through the right ventricle of the heart, causing instant death. The evidence having been heard, the jury returned a verdict that David S. Terry, aged sixty-seven years, had been killed by gunshot wounds at the hands of David Neagle. This was a wonderful verdict, considering the facts, as not only the few who saw it, but people in every State in the Union, in every city and town, and in the principal cities of the civilized world, knew it, but the law and custom demanded that the fact be ascertained and placed upon

record. There was no intimation that a crime had been committed, and no justification offered in defense. It was an open question, and in furtherance of justice. Mrs. Terry appeared before Justice of the Peace H. V. J. Swain, in company with the district attorney of San Joaquin County, and swore out a warrant upon complaint charging both Neagle and Justice Field with the murder of her husband. She was vindictive in her sorrow, and while she knew Justice Field had not committed the deed, she was just as sure that he was the one who provoked the quarrel, and she would sooner have Field convicted and hung than have anything to do with Neagle, who was only Field's armor-bearer in the drama. The document prepared for the arrest of Field was placed in the hands of the sheriff, who proceeded to San Francisco to serve it, as was his duty, and Sheriff Cunningham was never known to shirk his duty on any occasion, although, as in this instance, he generally knew whether there was any foundation for such a proceeding.

The excitement at Stockton, where Judge Terry had lived so long, was intense, and while the most prominent men of that city made no particular demonstrations and exhibited no evidences of a spirit of revenge, the country people, who loved him as a friend, and whom he had always befriended, were loud in their denunciation of the authorities and of the man who had committed the deed. He had been to them a champion, and they had failed to see in him the monster which politicians and men of ambition had painted him. Their hero lay dead before them, and during the long day, and even far into the night, the

vehicles were seen coming from every direction. Large numbers remained all night, and the following morning the city was alive with farmers who were not slow nor timid in expressing their sentiments. There was some little anxiety felt in official circles, owing to the insecurity afforded by the old jail, and it found expression in the following dispatch forwarded by the Associated Press to the Boston *Herald* on the morning of the 16th—the day of the funeral:—

“There is every prospect of a lively row at the Terry funeral this afternoon, and violence afterward. One of Terry’s friends, Judge Porter of Arizona, proposes to deliver the funeral oration. He says he will go for Field, and denounce Terry’s shooting as foul murder. If he does, some of the leading citizens declare they will stop him if they have to use force. Feeling runs very high in the town. Last night groups of men discussed the case for and against the Terrys. The ranchers and farmers from the interior came into town and mingled with Stockton people. Discussion on the street corners became boisterous at times. Here and there an old resident would say a bitter word against Justice Field. In many cases the killing of Terry was pronounced cold-blooded murder.

“In consequence of talk upon the streets some alarm is felt at the county jail where Neagle is confined. No one is allowed to see the prisoner. A guard of six officers are on duty at the jail. No one is even admitted into the outer office of the prison. The jail is a dingy, old, two-story brick structure. It is merely intended as a makeshift until the new jail and courthouse reach completion. During the night a small

number of Terry followers, all rather desperate in character, gathered near the jail and made a careful inspection of the old trap. No threats were made, but one of the number quietly remarked later that it would only be child's play to storm that 'paper box' and pull Neagle out for introduction to Judge Lynch. This is certainly true. It would be an easy job, and a quick one. If a riot is successfully started this afternoon by Judge Porter's oration on the Mark Antony order, the storming of the jail would be the first part of the plot, and the citizens here are fearful of the result. It could not be held for ten minutes against a well-armed and determined attack. The sheriff, forewarned of the probable danger to his prisoner, has drafted the best men he could find into the service of the county and intends to defend Neagle at all hazards.

"This morning the situation is ominous. No loud professions of a programme are made by the Terry men, but they are holding whispered conferences at street corners, and evidently intend to carry out some desperate plot at the funeral this afternoon. There is great alarm in all the country around Stockton, and citizens have ordered the women and children to remain indoors till the threatened trouble is over."

The reference to Judge W. W. Porter was altogether out of place and did him a great injustice. While he was a dear friend and great admirer of Judge Terry, he was, on this occasion, too sad and seriously affected at the tragic death of one whom he considered without a peer in California, intellectually, morally (so far as honesty and integrity were concerned), and phvsi-

cally, to take part in any but the most solemn exercises. He had no thought of delivering any oration, funeral or otherwise, although he was invited to do so. He was there merely to pay his respects to the memory of the man whom he had so much admired while living, and, as he has said to the writer, to take a final leave of the form of one the like of whom he never expected to see again. There was no demonstration at Stockton of an exciting character. There were no remarks at the grave when Terry's form was fittingly laid beside his first wife. The funeral was largely attended by the people from the country, and the pallbearers were all men of high social and business standing. Their names were: Hon. Henry Miller, of Tehama County; Hon. B. F. Langford, of San Joaquin County; Hon. W. D. Grady, of Fresno County; W. E. Turner, Esq., of Stanislaus County; James C. Smith, Paul W. Bennett, General Canavan, Captain Murray, E. L. Colnon, James A. Morrissey, ex-Mayor Welch, Superior Judge Budd, S. D. Woods, J. D. Peters, George W. Trahern and Mayor Reubenstein, of Stockton.

Mrs. Terry and his surviving son, Clinton H. Terry, were the only relatives present, although there were many who sympathized deeply with them. The most careful attention was given to the disposition of the people, as many very foolish and unguarded expressions had been indulged in by a few who imagined that a riot might be possible in order to take Neagle from the jail and hang him, but the truth was that Neagle could have walked the streets without any fear of violence. The friends of Terry were in no mood

for violence, for they knew that he had exercised his vengeance beyond reason, and in the act had invited an attack, and that Field was the man who was expected to resent the insult. Had Justice Field appeared upon the streets of Stockton it might not have been safe for him. Neagle was only considered a tool, and correctly so, and it would not have avenged the murder by treating him with any degree of violence. He was no more responsible than the bullet which was projected from the pistol he held in his hand. Behind him was the official order, and behind that order was a power which has become more potent than all things else.

As Neagle has achieved some notoriety as the man who killed Judge Terry and the armor-bearer of Justice Field, a brief sketch of his brilliant career will necessarily be expected by the reader in connection with this subject:—

David Neagle is well known where he was born, about thirty-five years ago. He was reared in the neighborhood of Telegraph Hill, where he lived until 1870, when he went to Arizona, being attracted there by the mining excitement. In Arizona, Neagle went into the contracting business, sinking shafts in mines. Leaving the mines he went to Tombstone, where he first made his record as a cool, deliberate, self-reliant, and brave man.

Neagle opened a saloon, and in a short time he became a great favorite with the better element of the town.

It was about this time that the Earp brothers were running things with a high hand in that section.

These daring men were not the only ones who made life insecure, and the brawls that took place nightly seldom quieted down before one or more dead lay in the field.

Neagle was a little man, not over five feet five inches in height, and weighing about one hundred thirty-five pounds. He is twenty pounds heavier now and two inches taller. He had quelled so many disturbances in his own saloon from time to time that his friends believed he would make a strong man to run as chief of police. He was elected, and from that moment desperadoes have had little to do with Tombstone.

Shortly after he entered office, one of the Earps came into town, and, passing Neagle, who was sitting with his chair tilted back on the porch outside of the saloon, said:—

“So you’re the man who is running this camp?”

“I believe that’s it,” answered Neagle coolly, “or I’m trying to, at least.”

“Well, I want you to understand you can’t run one side of me,” put in the bully.

Neagle pushed his chair forward and rose.

“Wait a minute,” he said to Earp, and he walked into the saloon very deliberately, procuring pistols, and returning.

“Take either one of these,” he said to Earp. “I think you’re a cur and I’ll prove it, if you will come out here on the road.”

Earp was mastered and walked quietly away.

It was but a short time after that when a drunken Mexican desperado entered the town to shoot every

white man he could find. Poynton, one of Neagle's officers, attempted to arrest him and was shot down. Neagle armed himself and started out after the Mexican, who, after emptying his revolvers at his pursuer, jumped his horse and fled to the hills.

Unmounted, and with an ordinary thirty-eight caliber revolver, Neagle made his way on foot through the hills, and the next day he returned on the Mexican's horse, packing the desperado's corpse in front of him. He had followed the fellow to his own lair and demanded his surrender. The Mexican grabbed for a rifle and shot Neagle through the clothing, but he never had time to shoot again, the chief's pistol ball striking him in the eye.

Desperadoes had no further use for Neagle after that affair, and Tombstone quieted down in good shape.

Neagle was re-elected chief of police, and in 1882 he ran for sheriff, being defeated by a few votes by John Behan.

After a short visit to Butte, Montana Territory, Neagle came back to this city in 1883, and was a hard worker during the Cleveland campaign.

When Sheriff Hopkins was elected in 1885, Neagle was appointed deputy sheriff, and, on account of his coolness and bravery, he was given the very hardest details of the office.

Later he went into the license collector's office under Collector Tim O'Brien, where he worked till June 17, 1889. On that date he was appointed deputy United States marshal, under J. C. Franks.

CHAPTER XLVII.

POLITICAL AND SOCIAL CHANGES—ESTIMATE OF TERRY'S MENTAL CONDITION—THE TRUE STATE OF HIS MIND AND CAUSE OF THE RASH ACT.

Were it not for the peculiar incidents which followed the killing of Judge Terry, and questionable proceedings in extricating those who were incidentally responsible for the act, it would be most fitting that this highly interesting and sensational biography should close at the grave of the hero. But posterity will inquire into the condition of society at the time, in order to draw conclusions as to responsibilities. Elsewhere in this work an idea is presented that in the realms of science and art, the finite and infinite have, during the past century, been approaching each other with rapid strides, through the genius that has its origin in intellectual development, and the friction of mind in contact with matter. It is the age of electricity, and that subtle fluid has become the servant of genius. While this is true, the moral and physical are becoming corrupt and debased in the process of drawing a marked and revolting line between poverty and wealth. The man who can be reached only through his convictions is a lonesome pilgrim in a vast multitude, and while he may be respected for his integrity, he is not appreciated. Nor this alone. If he has ambition for place and power, he must either part

with his honor and independence or submit to defeat, unless he has fathomed the depth of human gratitude by a will force and wisdom which make the hero whose fame has become a household word against which the power of gold can have no impression. He must be upheld by the people, who sometimes become envious of their liberties, and produce a successful revolution. At present, trickery, duplicity, and fraud are the weapons of success, and rank corruption necessarily follows.

There was in Judge Terry a something bordering on prescience in his political theories. He was not a seer of the school of divinity, but he suffered for foretelling evils that were to come, as gauged by the corruption that existed. He was not afraid to denounce it as it existed, and in this he became the enemy of the corruptionists. In the formation period of this government when such men as Clay, Webster and Calhoun flourished, intellectual force, unswerving honesty, and devotion to principle were the virtues that were commendable. The middle period, that in which Broderick and Gwin flourished, intrigue, calumny and deception ruled with just enough integrity to pay political promises. These could be fathomed and rebuked by the people, but the later force that has found its way into the politics of the country is one that is so insidious that it cannot be successfully combated. It is the enemy of honesty and integrity. It is the purchasing power, and produces corruption, by bribery and purchase. Gold has taken the reins of government in hand. Moral tergitude has become the rule in the field of official ambition, and the old and whole-

some doctrine—"Is he honest? Is he competent?"—has been relegated to such tombs as that which contains the mortal remains of Judge David S. Terry.

When a man steps down and out, leaving a place so conspicuous as that produced by the absence of Judge Terry, there must necessarily be some inquiry in regard to the condition and character of the man whose absence creates such conspicuous vacancy.

In building his reputation the people did not take his true character into consideration. They had neglected to build on the proper foundation. He was born and bred in the rough but honest walks of life, and he held to that principle which evolved the golden rule in his makeup of human obligations, believing that he who is true to himself will be true to others. In the exercise of his faculties and in the progress of time he had met with every phase of human nature and confronted all conditions of society. In his actions he had demonstrated a faculty to meet every emergency with a significance that required no discussion as to the merits of the case either in the forum of intellectual disputation, the force of business obligations or the power of endurance and protector of physical manhood. He had combated with every advancing parasite that had sought to invade the body politic, which was and is the fundamental base of our liberty and freedom, and in the contest with the most dangerous and formidable of all—the "almighty dollar"—he was unequal to the task. His faith in the sovereign will of the people was never shaken. When the "almighty dollar" was heard in the constitutional convention, and its advocates were pleading its cause and urging its

claims, threatening to defeat the constitution before the people if its claims were not recognized, he said: "I have too much regard for the intelligence of the people of this State to believe that the elections can be controlled by such means. The people have seen too much of that in the past. In spite of all their influence, a square vote of the people of this State will sustain any measure which is intended to curb the grasping avarice of corporations and prevent further oppression." This was before the wholesale ownership of members of the Legislature and the debauchery of the judiciary was finally consummated, and the power transferred from the people to the monied power.

There was much said and many comments made about the condition of Judge Terry's mind at the time of his assault upon Judge Field that fatal morning. There was a wide diversity of opinion among individuals expressed as to the justification of the killing, but there could be but one sentiment as to the attack upon Judge Field. The simple assault was not so terrible in itself, and did not call for such extreme measures, but the far-reaching effect was made the basis for almost universal condemnation. Some individuals have been kind enough in their desires to frame an excuse for Judge Terry's act, to attribute the audacious deed to a weakening of intellect. Among others, Hon. Creed Haymond, who had been a friend and admirer of Terry's sturdy honesty and surprising intellectual force, while he condemned the act, expressed himself in the following language:—

"I knew Terry very well. In my opinion Terry has not been himself for a year past. He has been

crazy for a year. It was not the Terry of former days who walked into that dining room at Lathrop among women and children and did an act that could not but in some way have led to bloodshed. It is my belief that if he had killed anybody during the past twelve months he would have been acquitted on account of his mental condition. It was not the Terry of a few years back who caused that disgraceful scene a few months ago in the United States Circuit Court. I witnessed that remarkable defiance of the judiciary. I tried to calm him in his fury. When he thrust his hand into his bosom beneath his vest I caught his arm with my hands. With his great strength he threw me off as if I were a child. Several weeks later a friend of mine told Terry my experience with him. He was surprised, hardly believing it. With some emotion he said that he hadn't the least recollection of my actions. If United States Marshal Franks had not been remarkably courageous that day Terry would have been killed. A timid man would have shot him. Terry has met death at the hands of Neagle and nothing can be done to him for the shooting. Under the State's laws he is not guilty. The first subdivision of section 197 says that homicide is justifiable when committed to prevent a murder, or felony, or when there is an attempt to do someone great bodily injury. This latter clause goes further than the common law and the statutes of some of the other States. Homicide is not justifiable for a mere blow—a simple assault not accompanied with a design to do great injury. Each case depends on its own circumstances. Neagle's case has its marked circumstances. A dangerous man had

to be dealt with. The man that assaulted Field had previously threatened him. Neagle was acting under the authority of the national government on account of these threats."

While this is a charitable offering from a friendly standpoint in mitigation of the act, it was not a correct estimate of the condition of Judge Terry's mind. It may be true that he could not remember minor incidents that occurred during his moments of frenzy, such as the one related above, but he was possessed of a motive that absorbed all his emotions. That his mind was in such a condition that he would not have been held responsible had he committed murder at any time during the previous twelve months, was a generous offering to the memory of the dead jurist and worthy of the heart that conceived it; but society was not built on such a generous foundation. His grim record, coupled with the hidden power that lurked in ambush ready to destroy its adversary, would never let him escape. Having been the architect of his own fortune, he proposed to be the defender of his own honor. He had suffered humiliation in the eyes of the world at the hands of the man now before him. His spirit was grieved and his flesh was animated. His great mind had brooded over the matter until he had alienated himself from all the world, and he was firm and hard as adamant. His former friends had shown an indifference toward him which he accepted as their verdict against his judgment in selecting an associate in domestic life, and this verdict was the more galling and oppressive when the condemnation was manifested by a withdrawal of their former social re-

lations. He judged the world as his enemy and he resolved to be the executioner in inflicting punishment on a plane parallel with his own standard of justice, and his own defender of personal honor. There was no exhibition of that fierce, violent and intemperate spirit that had actuated him on former occasions. He had considered long and well the measure of revenge. A premeditated, cool and determined step, devoid of emotion and excitement, took him to the rear of Justice Field. A sudden halt, a deliberate slap in the face, without an agitated nerve, as calm and with that supreme dignity and contempt that he would have slapped a troublesome cur, he executed his threat. No word, no boisterous movement was heard, and no note of warning accompanied the action. It was an act of defiance of all the laws of nature and of all the higher and nobler rules of society.

It was both brave and cowardly—brave, because it invited death, and cowardly because it was performed without warning and from behind his enemy. He meant it to leave a stigma that would burn into a flame only to be quenched by blood. He had said that the world was not big enough to hide Justice Field from him and Judge Terry was incapable of uttering an idle threat under such circumstances, and of all men Field should have known that. In the face of a knowledge of these threats Justice Field had dared to “beard the lion in his den,” and he found him. Lonely in his isolation from the world, he stood like Alcibiades, defying the arrows of his enemies, and like that Grecian hero, he braved the missiles of death that lay in ambush for him.

It was a deliberate act and executed with that diabolical coolness and absence of fear which characterized Judge Terry, and which had, in all cases where he had exercised his peculiar faculty, provoked an almost universal condemnation. In the fullness of his mental faculties and with a determination that brooked no restraint he gave the blow, remembering with deep poignancy the Alameda jail and the indignity, the humiliation that had taken root in his heart at the time. He could not exist in the atmosphere which surrounded him. He preferred death.

Such was undoubtedly the condition of his mind at that time, and he would have disdained any sympathy that reflected on his mental stamina. He had waited for and coveted the opportunity for a year, and no reconciliation could have been made. Nothing but the stern arm of the law could have intervened, and it was evident that those who had the power preferred to meet the emergency in a manner to remove him forever from the face of the earth, and so planned and arranged, as the sequel proved.

There is no room for apology on behalf of Judge Terry. He asked for none and did not expect it. No one knew better than he the consequences of such a monstrous act. While he may not have expected to meet death as he did, he took his life in his own hands, with a full knowledge of the fact that the chances were against him. It was such a breach of good conduct and all manly dignity that the world stood aghast at the spectacle. It was as though every noble sentiment and every high emotion of his former manhood and honor had been quenched in his great heart.

It is the universal sentiment expressed by his best friends and admirers, that while his death was untimely, he did not die too soon. Rather, that he did not die soon enough. Had he passed away two years before, when the wife of his earlier life departed, he would have been remembered as the just and upright judge, the great counselor, the incorruptible lawmaker and citizen, the tender and loving husband and father, the brave defender of his honor and that of the commonwealth, the advocate of the people against the encroachments of the moneyed power, the enemy of official corruption and venality, and the man of acknowledged ability and sterling integrity.

CHAPTER XLVIII.

ARREST OF JUSTICE FIELD—RELEASED ON HABEAS CORPUS—ACTION OF THE SUPREME COURT—STOCKTON BAR RESOLUTIONS—ACTION OF THE FRESNO BAR.

In obedience to the warrant issued by the justice of the peace of San Joaquin County, at the instance of Mrs. Terry and the district attorney, Sheriff Cunningham proceeded to San Francisco to arrest Justice Field for the murder of ex-Judge David S. Terry. He found the venerable justice in a room in the United States Custom House, and approached him with some timidity, not believing that he was in any direct manner responsible for the deed. Noticing his apparent hesitation, Justice Field, being aware of the object of his visit, spoke up promptly and said:—

“Officer, proceed with your duty I am ready, and an officer should always do his duty.”

The warrant was then read and Justice Field arrested. He remained in the keeping of the sheriff until a writ of *habeas corpus* was issued by Judge Lorenzo Sawyer, and a traverse prepared by Field. In this denial he avers that he is “a justice of the Supreme Court of the United States, allotted to the Ninth Judicial Circuit; that the warrant of the Justice of the Peace H. V. J. Swain, of Stockton, issued on

the 14th of August, 1889, under which he is held, was issued upon the sole affidavit of one Sarah Althea Terry, who did not see the commission of the act which she charges to have been a murder, and who is, herself, a woman of abandoned character, utterly unworthy of belief respecting any matter whatever. . . . That said warrant is the result of a conspiracy between said Sarah Althea Terry, H. V. J. Swain, justice of the peace, Avery C. White, district attorney, and E. L. Colnon, of Stockton, to prevent your petitioner from discharging the duties of his office hereafter, and to injure him in his person on account of the lawful discharge of the duties of his office heretofore, by taking him to Stockton, where he could be subjected to indignities, humiliations, and where they might compass his death. That the said conspiracy is a crime against the United States under the laws thereof, and was to be executed by an abuse of the process of the State court, two of said conspirators being officers of the said county of San Joaquin, one district attorney and the other a justice of the peace, the one to direct and the other to issue the warrant upon which your petitioner could be arrested."

The scathing denial of the facts stated in the warrant and petition for release under the writ of *habeas corpus*, was more of a charge arraigning the parties as criminals than a plea for freedom, and it created quite an excitement. The governor and the attorney-general of the State took an active part in the proceedings. They saw the ridiculous position in which the officers of San Joaquin County had placed themselves,

and recommended that the case be dismissed. When the coroner's jury returned a verdict that Terry had been killed by a pistol shot in the hands of David Neagle, Field not being made a party to the murder, the case was dismissed.

On the day of the funeral the Supreme Court of the State denied the petition on motion for a rehearing of the Sharon *vs.* Sharon case, which had been presented by Judge Terry, which practically ended all litigation in that celebrated legal controversy. It seemed fitting that the two should be consigned to the tomb on the same day. It was cause and effect ceasing to exist, leaving behind a lesson that should not be forgotten. On the same day, James L. Crittenden, an able attorney of San Francisco and an old and close friend of ex-Judge Terry, arose in the Supreme Court while that body was in session to offer a motion to adjourn out of respect to the man who had once been its honored presiding officer. In doing so he said:—

“I desire to renew the matter which I began to present last evening. As a friend, a personal friend, of the late Judge Terry, I should deem myself very cold, indeed, and very far from discharging the duty which is imposed upon that relation if I did not present the matter which I propose to present to the bench this morning. I have known the gentleman to whom I have reference for over thirty years, and I desire simply now, in stating that I make this motion, to say that the friendship of so many years, and the acquaintance and intimacy existing between that gentleman and his family and myself for so long a period, required that I should at this time move this court as a

court, out of recollection of the memory of the man who presided in the Supreme Court of this State for so many years with honor, ability and integrity, to adjourn simply out of respect to his memory. I have no other eulogy to utter. I simply remember, and I hope this court will remember, that he did preside in this court as chief justice for a number of years, with ability, character and integrity, and therefore I ask this court, out of respect to his memory, to adjourn during the day on which he is to be buried, which is to-day."

Chief Justice Beatty replied: "I regret very much that counsel should have persisted in making this formal announcement, after the intimation from this court. Upon full consultation he thought it better that it should not be done. The circumstances of Terry's death are notorious, and under those circumstances this court has determined that it would be better to pass the matter in silence, and not take any action upon it, and that is the order of the court."

This peremptory action of the Supreme Court was justly criticised. It was the spectacle of a judicial body to which David S. Terry had given more character than any man who had preceded or followed him, disregarding the sublime purity of the judiciary, as well as casting a slur upon that honesty and integrity with which he had invested it and made it respectable in the eyes of friends and foes. Beyond his character as ex-chief justice they had no right to go and with acts of his life outside of that they had no right to deal. It was simply condemning an upright man and playing to the lobby. How much more dignified, how much

more honorable, and how much more appropriate and just, was the action of the bar of San Joaquin County, where Judge Terry was best known, when, on the twentieth day of August, it took the following action in regard to the dead jurist and eminent attorney:—

WHEREAS, On the fourteenth day of August, 1889, Hon. David S. Terry died in the county of San Joaquin; and whereas for many years he had been an eminent and honored member of the bar, practicing before this honorable court and before the late District Court, of which this honorable court, under the new constitution, is the successor; and whereas, at one time he, with distinguished learning, ability and integrity, presided over the Supreme Court of the State a chief justice; and, whereas, he was a member from this county to the constitutional convention, rendering valuable service to the people of the State, it is deemed just that his memory should be perpetuated in and by the records of this honorable court, and to that end, therefore, be it

Resolved, That the late David S. Terry was a man of pre-eminent mental endowment; he stood intellectually easily in the front rank of the distinguished men who have, by their services, rendered the history of the western slope of the continent illustrious; that his strong individuality marked him as one able to abide in his own judgment and to act upon his own volition unaided by the counsel of others; his intellect was imperious and submitted to but few limitations that hedge an ordinary mind; that under any condition and in any country he would have been, by reason of many great qualities, a leader among men.

Resolved, That as a judge he was great and pure; that his judicial life is immortalized in his opinions, which have become part of the commonwealth embodied in the reports of the Supreme Court of the State, where they shall stand forever, reflecting luster upon his career as a judge without stain and above reproach.

Resolved, That, as an advocate, his fidelity to the interests of his clients was proverbial; that his devotion to their interests had the force of a fine moral instinct, and he believed in the honor of his client as he believed in his own honor; that faculty of his

mind drew him to what he regarded as the equities of his case, where he intrenched himself from thence to be removed never until his own intellect and moral consciousness were satisfied of his error.

Resolved, That, as a friend, he was loyal and generous; that he enriched his friends with singular nobility, and that it was a strong nature that could resist his power of fascination when he chose to use it in winning friendship, which, once won, was by him held as a permanent possession forever.

Resolved, That as a private citizen he was of acknowledged integrity, and in all his dealings with his fellow-men he was truthful and honest.

Resolved, That for his services to the State and to the people he deserves to be remembered.

These resolutions were adopted unanimously, entered upon the minutes in full, and the court thereupon adjourned out of respect to his memory.

Following this, on the twenty-sixth day of August, the bar of Fresno, where Terry lived at the time of his death, met to consider the report of a committee appointed at a previous meeting to prepare suitable resolutions concerning his death. The report recited the fact that ex-Judge Terry was a soldier of three wars,—“that of the war for Texan independence, that which triumphed in the conquest of the empire of which our great State is carved, in his early manhood, and that of the great civil war in his maturity, in each of which he distinguished himself for daring and intrepidity.

“That while occupying a judicial position the highest in the commonwealth, he was famed not less for his terseness and profundity than for his spotless integrity, impartiality and purity of character. In all

- the relations of life he was bold to rashness; of generous impulses, strong convictions and an acute sense of personal honor, he naturally made many enemies and mayhap some mistakes, but even his enemies have given him credit for the honesty of his motives and conduct, and no man has accused him of a petty or dishonorable act. Those who have known him intimately, know that in the private relations of life he was freer from vices, large and small, than most men, and was soft of heart and tenderly devoted to those close to him beyond what is usual, and he bound those to him with a fealty which great and kind natures only can command. Therefore,

“Resolved, 1st. That in the death of Hon. David S. Terry, late chief justice of the Supreme Court of this State, the bar of this State has lost one of its most distinguished and able members; and that the people of this State have lost one of their staunchest defenders.

“2d. That his brethren of the bench and bar of Fresno County deeply deplore his untimely death.

“3d. That these resolutions be spread upon the minutes of the court, and that it adjourn for such period as the judges thereof may order, in respect of the memory of our deceased brother.”

A motion was made to lay these resolutions on the table, and among other remarks made was the following by Judge Nourse, which were perfectly proper from his standpoint, but which go to show that he had partaken solely of the prevailing but erroneous idea that Judge Terry had become enraged at the opinion of Justice Field in a case at law, and sought revenge because of that decision. In his remarks he said:—

"There could be no possible question about the facts in this case; that everyone knew that this attack was made by Judge Terry upon Judge Field because of decisions made by the latter in his judicial capacity; that if these decisions had never been made the attack would never have been made. We do not propose to attack Judge Terry; we do not propose to say anything against him; we only insist that under these circumstances it is not wise to take any action in the matter. If the proposed resolutions are adopted, all to whom they shall come will look upon this action of the Fresno bar as an indorsement of the final act of Judge Terry's life."

True, without this suit and the manner of its termination there would have been no tragedy, and it is also true that if there had been no excessive imprisonment for contempt Justice Field would not have been molested, although Terry, who was in a position to know better than any other man, believed that there had been means used which were not honest in bringing about that decision.

The spirit which prompted this opposition to the resolutions aroused resentment, and after they had been adopted by a vote of eighteen to eight, resolutions were presented by a member of the bar, which, while they were dignified and correct in sentiment, were not germane to the proceedings; however, the members of the bar should have adopted them without hesitation.

CHAPTER XLIX.

JUSTICE FIELD INTERVIEWED—THE ATTORNEY-GENERAL EXPLAINS—THE ORDER DENOUNCED AS UNPRECEDENTED—PERSONAL VIEWS—DENOUNCED AS A MURDER.

Before Justice Field was released under the writ by the Circuit Court, he was called upon by prominent men and questioned as to his views of the homicide, and among others, newspaper men, who were anxious to ascertain his views in regard to Judge Terry. It was believed by many that a personal feud had existed between them, and that the imprisonment for contempt was only an excuse for the attack by Terry. Being closely questioned on that point Judge Field said in answer:—

“Have you been at any time informed of any threats made against you by Judge Terry and his wife in consequence of this commitment for contempt?”

“Of course they were mere reports to me. I never heard, myself, from them, any threats, but reports were brought to me of threats made by them, from a great number of sources. Information was given to me almost every day from many. The threats were against my life or of great personal indignities and humiliations, which, if I resented, would cause me to

lose my life. No one knew better than Judge Terry that I would resent any personal indignity from whatever source it might come; therefore, his threats were nothing less than that he would kill me if he met me. These threats were repeated to me by letters, by conversations, in the clubs, on the streets, and there was not a day passed but what I heard of them. Rumors of those threats reached Washington. In consequence of them, the attorney-general thought proper, I am informed, to give instructions which have been read here. I will state, aside from this, that the attorney-general also was informed of them by some members of Congress from the Pacific Coast, among others, Senator Stewart, who advised him to give the necessary directions to the marshal of this district to see that not only myself, but that Judge Sawyer should be protected from personal violence at the hands of these parties."

"Q.—Did you ever hear of any threats made by these people against Judge Sawyer?"

"A.—In the same way that I heard the threats against myself. Of course I never heard anything from them, but others repeated to me what was said."

"Q.—Judge, did you ever have any difficulty with Judge Terry before his commitment for contempt, last September?"

"A.—Never. I never had any. On the contrary, I supposed he had a kindly feeling toward me. I went on the bench of the Supreme Court of this State on the 13th of October, 1857. I was sworn into office by Judge Terry. I was on the bench with him for two years, less one month, and

succeeded him as chief justice of this State. During all that time there never was an unpleasant interview between us, with, perhaps, this exception: He told me in 1858 or 1859 that he hoped the South would secede, because he wanted the slave trade with Africa revived. That led to a heated discussion between him and myself. Not only that, but whenever he alluded to that subject, I spoke to him about the horror of the passage of slaves from Africa. He said he could not see any difference between getting negroes for slaves from Africa and taking them from one State to another. There was a little acrimony in that discussion, which took place several times. With that exception, nothing ever occurred during our intercourse to prevent us having pleasant consultations on all legal questions. After he resigned I succeeded him as chief justice. I saw very little of him afterward. When he went and joined the Confederacy of course I did not see him. On his return I do not think I met him until after 1870. After that he argued some cases before me. He always stopped before he came into court and had a few pleasant words with me, and also when I met him in the street and when I met him in the hotel. He never to my knowledge used an unkind expression against me until after I committed him for contempt. I had no feeling toward him personally in that proceeding. I would have committed the best friend I had in the world if he had been guilty of such outrages as he was guilty of on that day before this court.

“The man seems to me to have been all changed in the last few years and did not hesitate to assert

that the official actions of others were governed by improper considerations. I saw charges made against judges of the State courts that they had been corrupt in their decisions, that they had been bought."

When the attorney-general was questioned in regard to the matter, and particularly in connection with the order to the United States marshal, he said:—

"It was given out under my direction. There was danger that Judge Terry, who was stated to be a violent and desperate man, would very likely make a deadly assault upon Judge Field and Judge Sawyer, or both of them, and that some precaution ought to be taken in the premises. I, therefore, called the attention of the marshal of that district to these statements, and told him that it was due to the country and courts that precautions should be taken *to keep the peace*, and protect the courts and judges in the discharge of their duties."

Public sentiment had taken deep root, founded upon the reputation that politicians had given Terry in former years, the stabbing of Hopkins in 1856, when in contact with the Vigilance Committee in obedience to his high regard for lawfully-constituted tribunals of justice, and his duel with Broderick, projected through the slums of the worst kind of politics, in the furtherance of personal ambition, and on the eve of a great national conflict, at which time the slavery question was the great issue, and Judge Terry was on the objectionable side. This duel was one which was inevitable as gauged by social conditions at the time and the pressure brought to bear by outside influence, among individuals who were not in

line with Judge Terry in any manner whatever. From the time of this duel up to the day he exhibited his passion in the Circuit Court room in defense of his wife, he had been exemplary in his conduct. But the ban was upon him, and as he did not care to part with his well-grounded principles of honor and integrity to conform to the new order of things under a "higher civilization," it was "given out" and "stated" that he "was a violent and desperate man," and hence the attorney-general made the order so that the marshal should "take precautions" to protect the judges and "keep the peace."

Just what counselors the marshal called to his assistance in determining the course to be pursued has not been developed, and probably never will be. It is historically certain that he did not receive his instructions from those who possessed a humane desire to enforce the law, keep the peace, and protect human life. All the arrangements were projected from an anti-Terry standpoint, and he was kept in dense ignorance. He was a man who had the highest regard for the law. They knew that if placed under bonds to keep the peace he would suffer humiliation rather than violate his obligation. By such a procedure the ends sought to be accomplished would fail, and they chose rather to surround him with secret batteries in the hands of hired sentinels. In the presence of his unguarded threats and his reputation for violence, his death, no matter how encompassed, would only cause a momentary ripple and the one who did the killing could and would be considered safe from punishment and become a hero in the circle which flocked and

kneeled about the courts and avenues of wealth. The New York *Tribune*, a strong administration organ, edited by a gentleman of ability and the son-in-law of D. O. Mills, voiced the sentiment of Terry's friends when it said:—

“The Department of Justice has assumed the responsibility for the defense of the United States deputy marshal who killed Judge Terry. It has instructed the United States district attorney at San Francisco to take charge of the case. This will pit the Federal and State district attorneys against each other, if Neagle be put on trial for murder, and will bring up many questions of national and State jurisdiction and authority for which no precedents have been established. The proceedings of the department, while anomalous, are justified by the circumstances. Neagle acted as an agent of the attorney-general in protecting the associate justice, and the responsibility for his defense ought not to be shirked by those who employed him in an unprecedented exercise of Federal authority.”

The “unprecedented” was looming up on all sides, forced by the power that was making strides to the front under the “higher civilization,” propelled by coin. It was begun in this case by a six months’ imprisonment for contempt and was followed up by a dangerous system of espionage in view of getting rid of a man who was able to fathom the depth of human infamy and who was not afraid to denounce and expose it. While Judge Terry assumed a high-handed measure of responsibility in his determination to wreak vengeance on the head of Justice Field, he was fully aware that by no other means could he hope or expect to give

back measure for measure where the odds were against him and the power was in the hands of the judges who held the reins. He had never threatened Field's life unless violent resentment was resorted to. He was the equal of Justice Field in all the elements that go to make up the man, and his superior in reputation for honesty and integrity. The whole country was aware of the eminence of the two gentlemen. Field was more particularly noted as being a member of a celebrated family, while Terry had become famous as one who had battled against the encroachments of fraud and corruption, and who had preserved the integrity of the Supreme Court of the State while its honored chief justice, and had resigned that high position to fight a duel in defense of his honor, which was made second only to the celebrated Burr-Hamilton duel.

The San Francisco *Call*, one of the few newspapers that presented a calm review of the case and pointed out the only cause upon which the assault was based, published the following editorial the morning after the Lathrop tragedy:—

“The remarkable career of David S. Terry was brought to a tragic end Wednesday morning. From the account of the meeting with Justice Field one would almost conclude that he courted the fate that overtook him. He certainly could not have expected that such an indignity as he offered Justice Field would be allowed to pass with the punishment meted out for ordinary assault. The spirit which prompted the encounter is one that is passing away with a higher civilization. The disposition to take the law into one's own hands as a means of redress for private

wrongs, real or fancied, has blotted many a page of California's history. Physical courage, approaching insensibility to danger, has in the past served to divest the public mind of its horror of deeds of violence. This quality it may be admitted Judge Terry possessed to an unusual degree. It has been displayed on other occasions with fatal results. *The immediate cause of assault upon Justice Field was ex-Judge Terry's resentment of the order of the Circuit Court consigning him to jail for contempt.* This resentment was fanned by mischief makers who really persuaded Terry that he could not let such an affront pass without other notice than the redress the law provides. Articles have been circulated by a sensational contemporary that pointed to such an encounter as Judge Terry sought, and it is probable that whatever purpose he may have entertained originally was confirmed by these intimations that his friends expected him to seek personal satisfaction for the wrong he assumed the court to have done him. Ex-Judge Terry was too high-tempered to realize that his attack upon Justice Field was an attack upon the courts. The personal danger to which Justice Field was exposed came to him through the performance of what he conceived his duty. Nature had been generous in many respects to the dead jurist. He was a man of remarkable physical power and courage, and his mind was constructed in a scarce less generous mould. His infirmity was that of temper and of the school in which he was reared. Had he been the law-abiding citizen with the reverence for the law which one of his profession should entertain, he might have aspired to the highest honors this State had to bestow."

The intimation that Judge Terry was not a law-abiding citizen is without proof. It is an assertion without an authority. If he had any infirmity in that line it was on the other extreme. He believed that the object of law was to secure justice and a strict adherence to its principles was the great object of his life. As has been said in another place in this work, as a judge he was a martinet, and no consideration, personal or otherwise, could make him depart from his convictions of right and justice. He violated no law in all his professional career, but when force met force in defense of honor as custom demanded, and where a higher law seemed to be necessary for the protection of manhood, the statutes were suspended. The Visalia (Cal.) *Delta*, a newspaper not fettered by the moneyed influence, in speaking of the killing, said:—

“Opinions expressed find something to blame in the conduct of both Terry and Field. There appears to have been premeditation on both sides. Terry was not justified in offering to Justice Field, in public, the indignity he did, and the action of Justice Field in having with him a person whose business appeared to have been to kill Terry on the least provocation, looks cowardly. There is little regret over the death of Judge Terry, but the manner in which he was killed meets with universal condemnation. Had Field himself resented the blow from Terry and in doing so killed him, public opinion would have justified him, but it does not justify the employment of a person for the purpose of killing Terry on the slightest provocation.”

Private opinions were expressed by many persons,

in all of which the manner of the killing was condemned, while all seemed to agree in that the act of Judge Terry in making the assault was the most audacious to be found in the annals of history. Nobody but Judge David S. Terry was capable of such an act—so cool, so presumptuous, so outrageous in its execution. A few of his friends, all of whom were attorneys of San Francisco, have been quoted, as follows:—

James C. Crittenden—I can see no excuse for the killing of Judge Terry. It was uncalled for and unnecessary. If Justice Field had shot Terry, there might have been some excuse for the action, but a blow is not a sufficient excuse to justify a homicide. There is nothing to show that Terry contemplated committing a felony, or intended doing any great bodily harm, and consequently the killing was unnecessary. The arrest of Justice Field under the circumstances is eminently proper and just. For that eminent jurist and advocate, I have the highest respect, but none should be above the law.

W. P. Lawlor—The killing was unnecessary. A policeman calls upon a criminal to submit to arrest, before shooting him. The marshal should have done the same. He was a sworn officer, presumably cool and collected, and he should have known his duty. I do not justify Terry's acts, but he had done nothing to forfeit his life.

Edward L. Rhodes—There was no excuse, no necessity, for the killing. In a legal aspect the marshal acted inadvisedly. His statement about his words of warning to Terry are all bosh. Judge Terry died without knowing that he had been shot by an officer.

Terry is to be condemned for slapping Field, but he ought not to have been killed for it.

James W. Stevens, superintendent of the Manhattan Life Insurance Company, was very forcible in his denunciation of the homicide, pronouncing it a cold-blooded murder.

"Why on earth," said he, "could not the man have acted otherwise, had he not been determined to kill Judge Terry if any opportunity offered? Could he not have seized Terry's arm and prevented him from drawing a weapon? Could he not have thrown a dish in his face? Could he not have covered him with his pistol and ordered him to throw up his hands? He could at least have covered him and reserved his fire until Terry had drawn his own pistol and placed Judge Field's life actually in danger. As it is, Terry was shot down simply for slapping another man's face, and that, too, not by the man he slapped but by a paid henchman. I look upon this affair as a cold-blooded, premeditated murder. Field is openly accused of receiving bribes, and this looks like he was not above conspiring to commit murder."

R. B. Purvis, the sheriff of Stanislaus County, who arrested Neagle, said:—

"I was on my way to San Francisco and was at Lathrop when the affair occurred. I was not in the dining room, but heard the shots from where I stood, and at once rushed into the room.

"Upon the floor lay the body of Judge Terry, just as if he had lain down to sleep. His eyes were wide open, and his features wore an expression that bespoke no anger nor perturbation of spirit. I stooped down

over him and watched his lifeblood ebb away, saw his last gasps for breath, and then closed his eyes, which were staring placidly up at the ceiling.

"As soon as the judge expired I went over to the train for the purpose of arresting the murderer, and I found that Justice Field had got into the car and had both doors locked and a guard at each end of the car. I stated who I was, and demanded admittance, which was granted."

"Was there any resistance or disinclination on Neagle's part?"

"None whatever. On the contrary, I think he felt safer after being arrested. Justice Field tried to talk me out of the arrest, claiming that I had no right to arrest Neagle, but I paid no attention to that at all.

"When I entered the car Field stated to me that Terry had come up and slapped his face and then struck him a fierce and heavy blow in the face. This could not have been true, as I examined his face carefully, and there was not even a red mark on it.

"So far as Neagle's defying anyone to arrest him is concerned, that is all bosh. He made no resistance at all. I took him down to Tracy, where he was given in charge of Constable Walker, who took him, by means of a private conveyance, to Stockton, and I can assure you that he was intensely glad to go that way.

"One other thing I wish to correct, and that is the statement that Neagle said to Judge Terry, 'Stop, stop!' He said nothing, but deliberately drew his pistol and killed him."

In this instance the testimony of Mr. Purvis is corroborated by Mr. Lincoln, one of the proprietors of

the eating house, who was not only present, but a very anxious observer of every movement during the excitement. There is no occasion for quibbling in the matter. The evidence on which any reliability can be placed is indisputable, and reason itself is sufficient to prove that Terry had no warning, and that he was killed not realizing the presence of any officer of the law.

Two of the most eminent lawyers of Washington City, when questioned as to the killing, gave unreserved opinions from the highest legal standpoints in the following language.

J. J. Darlington, one of the leading members of the bar, said: "I think that the killing of Judge Terry by Deputy Marshal Neagle was perfectly indefensible. The attorney-general had no right whatever to send a man to look after the person of Associate Justice Field. If such a contingency had arisen that his life was in danger, the proper thing to have done was to have had Judge Terry arrested. Blackstone very plainly puts down the law on this subject. In the defense of oneself, every member of the family, wife, brother, father, or sister, a man has a perfect right to employ all necessaries, even to the taking of life. In this case, it seems to me that Neagle greatly exceeded his authority. He had no more legal right under the law to shoot Judge Terry than I had."

William T. Webb, ex-commissioner of the district and one of the oldest practitioners at the Washington bar, said: "In my opinion, the killing of Judge Terry by Deputy Marshal Neagle was entirely unjustifiable. The proper course would have been to arrest Terry

the very moment any act of violence was committed upon the person of Associate Justice Field. I think Neagle exceeded his authority. The mere fact of shooting down a man for an assault committed upon someone else is not justified in law. A man may be suspected of a felony, which is a penitentiary offense, and when he is known to be a desperate character, the circumstances for such an overt action might be justifiable. I cannot see how Neagle can be excused. It may have been that the threats of Judge Terry against the life of Justice Field were of such a nature as to justify the attorney-general to use proper precaution to see that the administration of justice was not interfered with. I don't imagine that there can be any doubt of that point, but killing a man for slapping the face of another is a rather serious business. Neagle was not a relative of Associate Justice Field, nor was he assaulted, and yet he shot down a man in cold blood for slapping the face of someone else. He was clearly in the wrong, and should have arrested Terry, and thus avoided this terrible tragedy."

CHAPTER L.

DAVID NEAGLE—TAKEN UNDER WRIT OF HABEAS
CORPUS TO SAN FRANCISCO—THE QUESTIONABLE
TRANSFER DONE UNDER COVER OF DARKNESS
AND IN SECRECY—RELEASED WITHOUT A TRIAL
—AN INGENIOUS DOCUMENT.

The Federal authorities having assumed the responsibility of the death of Judge Terry, his slayer was to be taken care of by that arm of the service, and means must be provided to release him from his imprisonment at Stockton. While there was no danger of any undue or violent proceedings against him, or any thought of his life being in danger, the fact that he had committed an act which was a crime against the laws of the State of California, and that he was amenable to its courts of justice, must be evaded in order to consummate the travesty on justice and set the prisoner free. He was, for the time being, the servant of the United States and the paid agent of the department of justice, and although that high tribunal should be held above suspicion in its every act, there was something which caused it to concoct and execute a scheme, worthy only of the actions of the celebrated "Council of Ten," in the dispensation of justice. When the highest judicial tribunal in the land has to resort to scheming, and to carry out its

schemes in secret and the darkness which protects the burglar and highwayman, the natural and only correct inference is that justice must be thwarted and crime covered up. The spectacle of a special train under cover of darkness and under orders from the United States Circuit Court, stealing its way across the plains, in an enlightened, free, and sovereign State, to take from a county prison a man who, although he had killed his fellow-man, was in no danger of punishment, has all the evidences of a desire to usurp the judicial prerogatives of a State, and thwart justice.

In this instance there was an underlying, deep design. There was no desire on the part of the Federal authorities, much less of other parties deeply interested in the matter, to submit to investigation. It would have developed more than the attorney-general ever dreamed of, although he was conscious of the fact that justice demanded an investigation. On this question he was free to speak, and in so doing he reflected rather severely upon the course that was finally adopted. Although guarded in his utterances lest he would involve someone in the meshes of the law, he undoubtedly recognized the fact that the State had a right and would take charge of the investigation. On this matter he said:—

“It was given out under my direction. In June I think it was, Justice Field and, I believe, some others, brought to my mind a case referring to the trouble out there last summer, and saying that there would likely be trouble again this summer. There was danger that Judge Terry, who was stated

to be a violent and desperate man, would very likely make a deadly assault upon Judge Field or Judge Sawyer—or both of them—and that some precautions ought to be taken in the premises.

“I see from the papers that the action of the deputy is pretty generally indorsed. It appears to be considered that Neagle’s presence was necessary and his action justifiable. I do not care to speak of the legal aspects of the case. I do not know any case analogous to it in our history, and I do not recall that it has ever been necessary before to protect a United States judge. If the case comes to trial, I suppose I will be called to testify, but I question whether there will ever be a trial. The grand jury may refuse to act or the coroner’s jury may find it a case of justifiable homicide. I have not examined the legal side of the question, however.

“I thought the protection of the officers of the law might be necessary, and I knew something about the desperate character of the man with whom Justice Field had to deal. I thought of trouble when the trial began, but of course I did not look for it at a way station or upon the train. If the justice’s life was in danger, though, he was as much entitled to the protection of an officer at an eating house as in a court room or upon a bench.”

A writ of *habeas corpus* was issued by the United States Circuit Court for the release of David Neagle, and the sheriff of San Joaquin County was ordered to take the prisoner to San Francisco, where the application was made and to be heard before Judge Hoffman. The officer was instructed to take him from

the Stockton jail early in the morning, and while it was yet dark, and by a special car, with special orders for a swift transit, to land him in San Francisco. It was a rather unique proceeding, considering the fact that the people of Stockton and San Joaquin County were considered loyal and peaceable, and had never exhibited a disposition to paralyze the arm of the judiciary or rebel against the processes of law. They had more like exhibited a submission under the extraordinary circumstances, and even assisted in keeping the peace when a revolt was imminent.

When Justice Field was arrested they unanimously declared it a high-handed act of injustice and folly, and the judicial inquiry over the body of the dead jurist, their own respected citizen, made no reference to Justice Field. There was a most remarkable exhibition of good judgment and forbearance in all their actions, and this clandestine movement on the part of the Federal authorities in the transfer of Neagle, created a feeling which had but one interpretation in the minds of men, who were always ready to submit to the operations of a writ so sacred as that of *habeas corpus*, no matter from what court it originated. There was no desire to bring a conflict between the Federal and State authorities, although the most eminent judicial minds considered the case one in which the State had jurisdiction.

Neagle was taken charge of by the Federal judiciary and the application was heard before Judge Hoffman, of the District Court. The attorneys for the State, seeing the end of the matter, and recognizing the fact that he would be discharged without a trial,

retired from the contest and permitted the farce to go by default. After statements had been made by Justice Field and others, and the orders and authorities under which Neagle had acted, there being no one present to present the case of the people or represent the State in the hearing of the application, Judge Hoffman presented the decision of the court in the following elaborate and remarkable paper, which the reader can peruse with profit:—

“In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California. In the matter of David Neagle on *Habeas Corpus*, No. 10,469.

STATEMENT OF FACTS.

“Before Sawyer, circuit judge, and Sabin, district judge.

“John T. Carey, United States attorney, Richard S. Mesick, Samuel M. Wilson, W. F. Herrin, W. L. Dudley, H. C. McPike, C. L. Ackerman, J. C. Campbell for the petitioner.

“G. A. Johnson, attorney-general State of California, J. P. Langhorne, Avery C. White, district attorney San Joaquin County, Cal., for the respondent.

“This is an application for the discharge of David Neagle, upon a writ of *habeas corpus*. It arises out of the following facts:—

On the 3rd of September, 1888, certain cases were pending in the Circuit Court of the United States, for the Northern District of California, between Frederick W. Sharon, as executor, *vs.* David S. Terry and Sarah Althea Terry, his wife, and between Francis G. Newlands, as trustee, and others against the same

parties, on demurrers to bills to revive and carry into execution the final decree of the court, in the suit of William Sharon *vs.* Sarah Althea Hill, and were decided on that day. That suit was brought to have an alleged marriage contract between the parties adjudged to be a forgery, and to obtain its surrender and cancellation. The decree rendered adjudged the alleged marriage contract to be a forgery and ordered it to be surrendered and canceled. The decree was rendered after the death of William Sharon, and was, therefore, entered as of the day when the case was submitted to the court. By reason of the death of Sharon, it was necessary, in order to execute the decree, that the suit should be revived. Two bills were filed, one by the executor of the estate of Sharon, and the other, a bill of revivor and supplemental, by Newlands, as trustee for that purpose.

“In deciding the cases, the court gave an elaborate opinion upon the question involved, and while it was being read, certain disorderly proceedings took place, for which the defendants, David S. Terry and wife, were adjudged guilty of contempt and ordered to be imprisoned. The following is an accurate statement of those proceedings, slightly condensed from the opinion of the court, delivered on the subsequent application of David S. Terry, to have the order of commitment revoked. For the whole proceeding, see *In re Terry*, 36, Fed. Rep., 419.

“Shortly before the court opened the defendants came into the court room and took their seats within the bar at the table next to the clerk’s desk, and almost immediately in front of the judges, the defendant,

David S. Terry, being at the time armed with a bowie knife, concealed on his person, and the defendant, Sarah Althea, his wife, carrying in her hand a small satchel, which contained a revolver of six chambers, five of which were loaded. The court, at that time, was held by the justice of the Supreme Court of the United States, allotted to this circuit, who was presiding, the United States circuit judge of this circuit, and the United States district judge, of the district of Nevada, called to this district to assist in holding the Circuit Court. Almost immediately after the opening of the court, the presiding justice commenced reading its opinion in the cases mentioned, but had not read more than one-fourth of it, when the defendant, Sarah Althea Terry, arose from her seat and asked him, in an excited manner, whether he was going to order her to give up the marriage contract to be canceled. The presiding justice replied, 'Be seated, madam.' She repeated the question, and was again told to be seated. She then called out in a violent manner that the justice had been bought, and wanted to know the price he held himself at; that he got Newlands' money for his decision, and everybody knew it, or words to that effect. It is impossible to give her exact language. The judge and parties present differed as to the precise words used, but all concurred as to their being of an exceedingly vituperative and insulting character.

"The presiding justice then directed the marshal to remove her from the court room. She immediately exclaimed that she would not go from the room, and that no one could take her from it, or words to that effect.

The marshal thereupon proceeded toward her to carry out the order for her removal, and compel her to leave, when the defendant, David S. Terry, rose from his seat, evidently under great excitement, exclaiming, among other things, that "no living man shall touch my wife," or words of that import, and dealt the marshal a violent blow in his face. He then unbuttoned his coat and thrust his hand under his vest, where his bowie knife was kept, apparently for the purpose of drawing it, when he was seized by persons present, his hands held from drawing his weapon, and he himself forced down on his back. The marshal then removed Mrs. Terry from the court room. Soon afterward Mr. Terry was allowed to rise and was accompanied by officers to the door leading to the corridor on which was the marshal's office. As he was about leaving the room, or immediately after stepping out of it, he succeeded in drawing his knife, when his arms were seized by a deputy marshal and others present to prevent him from using it, and they were able to take it from him only after a violent struggle.

"The petitioner, Neagle, succeeded in wrenching the knife from his hand whilst four other persons held onto the arms and body of Terry, one of whom held a pistol at his head, threatening at the same time to shoot him if he did not give up the knife. To these threats Terry paid no attention, but held onto the knife, actually passing it during the struggle from one hand to another.

"Mr. Cross, a prominent attorney, who on that occasion sat next to Mrs. Terry, a little to her left and

rear, testifies that just before she arose to interrupt Judge Field she nervously fingered at the clasp of a ~~small~~ satchel about nine inches long, and tried to open it; and not succeeding, in consequence of her excitement, she hastily sprang to her feet and interrupted the judge, as hereinbefore stated. Knowing that she had before drawn a pistol from a similar satchel in the master's room, he concluded at this time that she was trying to get her pistol out, and he consequently held himself in readiness to seize her arm as soon as it should appear and endeavor to prevent its use until he could get assistance, his right arm being partially disabled. For one occasion in the master's office see *Sharon vs. Hill*, 11, *Sawyer*, 125. At this time Mrs. Terry sat directly in front of Justice Field and the circuit judge, less than four yards from either. A loaded revolver was afterward taken from this satchel by the marshal. For their conduct and resistance to the execution of the order of the court the defendants, Sarah Althea Terry and David S. Terry, were adjudged guilty of contempt and ordered to be imprisoned, the former for thirty days and the latter for six months.

"In consequence of the imprisonment which followed various threats of personal violence to Justice Field and the circuit judge were made by Judge Terry and his wife. These threats were that they would take the lives of both of those judges; those against Justice Field were sometimes that they would take his life directly, at other times that they would subject him to great personal indignities and humiliation, and if he resented they would kill him.

“ These threats were not made in ~~ambiguous~~ terms, but openly and repeatedly, not to one person, but to many persons, till they became the subject of conversation throughout the State and of notice in the public journals. Reports of these threats through the press and through reports of the United States marshal and United States attorney reached Washington, and in consequence of them the attorney-general thought proper to give instructions to the marshal of the United States for the northern district of California to take proper measures to protect the persons of those judges from violence at the hands of Terry and his wife. On the return of Judge Field from Washington to attend his circuit in June last, the probability of an attack by Judge Terry upon him was the subject of conversation throughout the State, and of notices in some of the journals in the city of San Francisco. It was the general expectation that if Judge Terry met Judge Field violence would be attempted upon the latter.

“ In consequence of this general belief and expectation, and the fact that the attorney-general of the United States had given instructions to the marshal to see that the persons of Justice Field and of the circuit judge should be protected from violence, the marshal of the northern district appointed the petitioner in this case, David Neagle, to accompany Mr. Justice Field whilst engaged in the performance of his duties and whilst passing from one district to another within his circuit, so as to guard him against the threatened attacks. He was specially commissioned as a deputy by Mr. Franks, whose instructions to him were that he

should protect Justice Field at all hazards; and, knowing the violent and desperate character of Judge Terry, that he should be active and alert and be fully prepared for any emergency, but not to be rash; and in case any violence was attempted from anyone, to call upon the assailant to stop, and to inform the assailant that he was an officer of the United States.

“Judge Terry was a man of great size and strength, who had the reputation of being always armed with a bowie knife, in the use of which he was specially skilled, and of showing great readiness to draw and use it upon persons toward whom he entertained any enmity or had any grievance, real or fancied.

“On the 8th of August, 1889, Justice Field left San Francisco for Los Angeles in order to hear a *habeas-corpus* case which was returnable before him at that city on the 10th of August, and also to be present at the opening of the court on the 12th. He was accompanied by Deputy Marshal Neagle, the petitioner. Justice Field heard the *habeas-corpus* case on the 10th of August. On the 12th of August he opened the Circuit Court, Judge Ross sitting with him, and he delivered on the latter day an opinion in an important land case, and also an opinion in the *habeas-corpus* case. On the following day the court heard an application for an injunction in an important water case from San Diego County. No other cases being ready for hearing before the Circuit Court, he took the train on Tuesday, the 13th, at 1:30 o'clock in the afternoon, for San Francisco, where he was expected to hear a case then awaiting his arrival, immediately upon his return, being accompanied on his return by Deputy

Marshal Neagle. On the morning of the 14th, between the hours of 7 and 8 in the morning, the train arrived at Lathrop, in San Joaquin County, which is in the northern district of California, a station at which the train stopped for breakfast. Justice Field and the marshal at once entered the dining room, there to take their breakfast, and took their seats at the third table in the middle row of tables. Justice Field seated himself at the extreme end, on the side looking toward the door. The deputy marshal took the next seat on the left of the justice. What subsequently occurred is thus stated in the testimony of Justice Field:—

“ ‘A few minutes afterward Judge Terry and his wife came in. When Mrs. Terry saw me, which she did directly she got diagonally opposite me, she wheeled around suddenly and went out in great haste. I afterward understood, as you heard here, that she went for her satchel. Judge Terry walked past opposite to me and took his seat at the second table below. The only remark I made to Mr. Neagle was, “There is Judge Terry and his wife.” He remarked, “I see him.” Not another word was said. I commenced eating my breakfast. I saw Judge Terry take his seat. In a moment or two afterward I looked round and saw Judge Terry rise from his seat. I supposed at the time he was going out to meet his wife, as she had not returned, so I went on with my breakfast. It seems, however, that he came round back of me—I did not see him—and he struck me a violent blow in the face, followed instantaneously by another blow. Coming so immediately together, the two blows seemed like one assault. I heard, “Stop, stop!” cried by Neagle. Of

course I was for a moment dazed by the blows. I turned my head round and I saw that great form of Terry's with his arm raised and his fist clenched to strike me. I felt that a terrific blow was coming, and his arm was descending in a curved way as though to strike the side of my temple, when I heard Neagle cry out, "Stop, stop! I am an officer." Instantly two shots followed. I can only explain the second shot from the fact that he did not fall instantly. I did not get up from my seat, although it is proper for me to say that a friend of mine thinks I did; but I did not. I looked around and saw Terry on the floor. I looked at him and saw that particular movement of the eyes that indicates the presence of death. Of course it was a great shock to me. It is impossible for anyone to see a man in the full vigor of life, with all those faculties that constitute life instantly extinguished, without being affected, and I was. I looked at him for a moment, then rose from my seat, went around and looked at him again and passed on. Great excitement followed. A gentleman came to me whom I did not know, but I think it was Mr. Lidgerwood, who has been examined as a witness in this case, and said, "What is this?" I said: "I am a justice of the Supreme Court of the United States. My name is Judge Field. Judge Terry threatened my life and attacked me, and the deputy marshal has shot him." The deputy marshal was perfectly cool and collected and stated, "I am a deputy marshal and have shot him to protect the life of Judge Field." I cannot give you the exact words, but I give them to you as near as I can remember them. A few moments afterward the deputy marshal

said to me, "Judge, I think you had better go to the car." I said, "Very well." Then this gentleman, Mr. Lidgerwood, said, "I think you had better." And with the two I went to the car. I asked Mr. Lidgerwood to go back and get my hat and cane, which he did. The marshal went with me, remained for some time and then left his seat in the car, and, as I thought, went back to the dining room. (This is, however, I am told, a mistake, and that he only went to the end of the car.) He returned, and either he or someone else stated that there was great excitement; that Mrs. Terry was calling for some violent proceedings. I must say here that dreadful as it is to take life it was only a question of seconds whether my life or Judge Terry's life should be taken. I am firmly convinced that had the marshal delayed two seconds both he and myself would have been the victims of Terry.'

"Mr. Neagle, in his testimony, stated that before the train arrived at Fresno he got up and went out on the platform, leaving the train, and there saw Judge Terry and his wife get on the cars; that when the train arrived at Merced he spoke to the conductor, Woodward, and informed him that he was a deputy United States marshal, that Judge Field was on the train, and also Judge Terry and his wife, and that he was apprehensive that when the train arrived at Lathrop there would be trouble between those parties, and inquired whether there was any officer at that station, and was informed in reply that there was a constable there; that he then requested the conductor to send word to the officer to be at Lathrop on the arrival of the train, and that he also applied to other parties to

induce them to endeavor to secure assistance for him at that place in case it should be needed. The deputy marshal further stated that when the train arrived at Lathrop Justice Field went into the dining room, he accompanying the justice; that they took seats at a table; that shortly after they were seated Judge Terry and his wife entered the dining room, his wife following him several feet in the rear; that when the wife reached a point nearly opposite Justice Field, she turned around and went out rapidly from the room, and as appeared from what afterward followed, she went to the car to get her satchel. When she returned from the car the satchel was taken from her and it was found to contain a pistol—revolver—containing six chambers, all of which were loaded with ball. The pistol lay on the top of the other articles in the satchel. The witness further stated that Judge Terry passed down opposite Justice Field to a table below where they were sitting; that in a few minutes whilst Justice Field was eating, Judge Terry rose from his seat, went around behind him—the justice not seeing him at the time—and struck him two blows, one on the side and the other on the back of the head; that the second blow followed the other immediately; that one was given with the right hand and the other with the left; that Judge Terry then drew back his hand with his fist clenched, apparently to give the justice a violent blow on the side of his head, when he (Neagle) sprang to his feet, calling out to Terry, ‘Stop, stop! I am an officer;’ that Terry bore at the time on his face an expression of intense hate and passion—the most malignant the witness had ever seen in his life, and that

he had seen a great many men in his time in such situations, and that the expression meant life or death for one or the other; that as he cried out these words, 'Stop, stop! I am an officer,' he jumped between Terry and Justice Field, and at that moment Judge Terry appeared to recognize him, and instantly with a growl moved his right hand to his left breast, to the position where he usually carried his bowie knife; that as his hand got there the deputy marshal raised his pistol and shot twice in rapid succession, killing him instantly. He further stated that the position of Judge Field was such—his legs being at the time under the table and he sitting—that it would have been impossible for him to have done anything, even if he had been armed, and that Judge Terry had a very furious expression, which was characterized by the witness as that of an infuriated giant. He also added that his cry to him to stop was so loud that it could be heard throughout the whole room, and that he believed that a delay in shooting of two seconds would have been fatal both to himself and Justice Field.

"The facts just stated in the testimony of Justice Field and of the petitioner were corroborated by the testimony of all the witnesses to the transaction. The petitioner soon afterward accompanied Justice Field to the car, and whilst in the car he was arrested by a constable, and at the station below Lathrop was taken by that official from the car to Stockton, the county seat of San Joaquin County, where he was lodged in the county jail. Mr. Justice Field was obliged to continue on to San Francisco without the protection of any officer. On the evening of that day,

“The petition was accordingly presented on behalf of Neagle to the Circuit Court of the United States, for a writ of *habeas corpus* in this case, alleging among other things that he was arrested and confined in prison for an act done by him in the performance of his duty—namely, the protection of Mr. Justice Field—and taken away from the further protection which he was ordered to give him. The writ was issued, and upon its return the sheriff of San Joaquin County produced a copy of the warrant issued by the justice of the peace of that county, and of the affidavit of Sarah Althea Terry, upon which it was issued. A traverse to that return was then filed in this case, presenting various grounds why the petitioner should not be held, the most important of which were that an officer of the United States, specially charged with a particular duty, that of protecting one of the justices of the Supreme Court of the United States, whilst engaged in the performance of his duty, could not, for an act constituting the very performance of that duty, be taken from the further discharge of his duty and imprisoned by the State authorities, and that when an officer of the United States, in the discharge of his duties, is charged with an offense consisting of the performance of those duties, and is sought to be arrested and taken from the further performance of them, he can be brought before the tribunals of the nation of which he is an officer and the fact then inquired into. The attorney-general of the State appeared with the district attorney of San Joaquin County, and contended that the offense of which the petitioner is charged could only be inquired into before the tribunals of the State.

“As to the question of jurisdiction, section 751 R. S. provides that ‘the Supreme Court and the Circuit and District Courts shall have power to issue writs of *habeas corpus*,’ and section 752 further provides that ‘the several justices and judges of the said courts, within their respective jurisdictions, shall have the power to issue writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty. There is no limit to the jurisdiction of these courts and judges to inquire into the restraint of liberty of any person, in these provisions. But section 753 prescribes some limitations, among which is ‘that the writ shall not extend to a prisoner in jail . . . unless he is in custody for an act done or committed in pursuance of a law of the United States, or an order, process, or decree of a court thereof, or in custody in violation of the constitution or of a law or treaty of the United States,’ and this legislation in the language of the chief justice, in *McArdle’s* case, 6 Wall., 325–6, in commenting upon the same provision in a prior act, ‘is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty, contrary to the national constitution treaties, or law. It is impossible to widen this jurisdiction.’ And again, in *Ex-Parte Royall*, 117 U. S., 249, the Supreme Court says: ‘As the judicial power of the nation extends to all cases arising under the constitution, the laws and treaties of the United States; as the privileges of the writ of *habeas corpus* cannot be suspended unless when, in cases of rebellion or invasion, the public safety may require it; and as Congress has

power to pass all laws necessary and proper to carry into execution the powers vested by the constitution in the government of the United States, or in any department or officer thereof, no doubt can exist as to the power of Congress thus to enlarge the jurisdiction of the courts of the Union, and of their justices and judges. That the petitioner is held under authority of a State cannot affect the question of the power or jurisdiction of the Circuit Court to inquire into the cause of this commitment, and to discharge him if he be restrained of his liberty in violation of the Constitution. The grand jurors who found the indictment, the court into which it was returned and by whose order he was arrested, and the officer who holds him in custody, are all, equally with citizens, under a duty, from the discharge of which the State could not release them, to respect and obey the supreme law of the land, 'anything in the constitution and laws of any State to the contrary notwithstanding,' and that equal power does not belong to the courts and judges of the several States; that they cannot under any authority conferred by the State discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the general government acting under its laws, results from the supremacy of the Constitution and laws of the United States. *Ableman vs. Booth*, 21 How., 506; *Tarble's case*, 13 Wal., 397; *Robb vs. Connolly*, 111 U. S., 624.

"We are therefore of the opinion that the Circuit Court has jurisdiction upon writ of *habeas corpus* to inquire into the cause of appellant's commitment, and to

discharge him,' if he be held in custody in violation of the Constitution.'

"In the exercise of this jurisdiction there is no conflict between the authorities of the State and the United States. The State in such cases is subordinate and the national government paramount. 'The Constitution and laws of the United States are the supreme laws of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity.' Siebold's case, 100 U. S., 392; see also *Tennessee vs. Davis*, 100 U. S., 257-8. The exclusive authority of the State is now earnestly pressed upon our attention. In Siebold's case the court says: 'It seems to be overlooked that a national Constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his State government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised toward this government in reference to the preservation of our liberties than is proper to be exercised toward the State governments. Its powers are limited in number and clearly defined, and its action within the scope of these powers is restrained by a sufficiently rigid bill of rights for the

protection of its citizens from oppression. The true interest of the people of this country requires that both the national and State governments shall be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other.' 100 U. S., 394, sec. *Id.* 2666-7. This court, then, has jurisdiction to inquire upon this writ into the cause of the imprisonment of the petitioner, and if, upon such inquiry, he is found to be 'in custody for an act done or omitted in pursuance of a law of the United States,' then he is in custody in violation of the Constitution and laws of the United States, and he is entitled to be discharged, no matter from whom, or under what authority the process under which he is held may have issued, the Constitution and laws of the United States made in pursuance thereof being the supreme law of the land.

"It is, therefore, only necessary to inquire and ascertain whether the petitioner is in custody for an act done in pursuance of a law of the United States in order to dispose of the case.

"As we have seen from the statement of facts, Mr. Justice Field, of the United States Supreme Court, allotted to the Ninth Circuit, was traveling officially from one part of his circuit to another, in pursuance of the requirements of the statutes of the United States, for

the purpose of holding a Circuit Court. By reason of threats to his life made by dissatisfied litigants, generally known and published in the newspapers, and brought to the knowledge of the United States marshal for the northern district of California, and by him called to the attention of the attorney-general of the United States, that officer directed the marshal to furnish the justice with protection while thus engaged in the performance of his judicial duties on the circuit. The marshal, deeming it proper, furnished the necessary protection by assigning that duty to the petitioner, who was a United States deputy marshal. The claim is that the petitioner, as such deputy marshal, was affording the only protection practicable to Justice Field in the lawful discharge of his duty when the homicide was committed, and that the killing was necessary to the preservation of the lives of both Justice Field and himself at the time when the fatal shot was fired. The homicide was committed at Lathrop, and not upon land purchased by the United States, with the consent of the State, for the needful uses of the United States, in pursuance of article 1, section 8 of the Constitution.

“Conceding the points to be as stated, do they present a case of an act performed in pursuance of a law of the United States, subject to their jurisdiction and to the jurisdiction of this court, and is the petitioner held under an arrest on a charge of murder by the State, in custody, in violation of the Constitution or laws of the United States, within the meaning of the statute.

“It is urged that since the homicide was committed in the State at large, and not in the courthouse, or

upon land within the exclusive jurisdiction of the United States, the question as to whether the homicide is murder is a question arising exclusively under the law of the State, and that it can be investigated and determined alone by the State courts. It is admitted on the part of the State that the United States has exclusive jurisdiction over the Custom House Block, and "over all places purchased by the consent of the Legislature of the State, in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings," in pursuance of section 8, article 1, of the national Constitution, and that the State has no jurisdiction whatever of any offense committed in such place. But it is contended, on the contrary, that the United States has no jurisdiction of offenders outside the lands so purchased in other portions of the State, but that in the State at large the jurisdiction of the State is exclusive. This proposition, like most others urged by those who insist on strict States' rights doctrines, wholly ignores the principle that there can be no legal conflict or inconsistency in matters wherein the State is subordinate and the United States paramount, where the constitution and laws of the United States are the supreme law of the land. We have already seen that, although in certain cases the courts of the United States have jurisdiction to discharge on *habeas corpus* prisoners held in custody by the State courts in violation of the Constitution and laws of the United States, yet that the State courts "cannot under any authority conferred by the State discharge from custody persons held by authority of the courts of the United States or of commis-

sioners of such courts, or by officers of the general government acting under such laws," and that this "results from the supremacy of the Constitution and laws of the United States." This principle, established in the Booth and Tarble cases, was recently properly recognized by the Supreme Court of California, when, upon the return of the writ of *habeas corpus* in Terry's case, it appeared that he was in custody by virtue of a judgment of the United States Circuit Court, it declined to require the sheriff to produce his body. As the powers and duties of the State and national courts are by no means reciprocal in this class of cases, so they are not reciprocal in the matter of territorial jurisdiction mentioned as claimed on the part of the State. The Constitution and laws of the United States as to these matters, wherein they are supreme, extend over every foot of the territory of the United States, and the jurisdiction of its courts to enforce rights derived thereunder, is as extensive as the territory to which they are applicable.

"In Siebold's case, the Supreme Court, in reply to an argument in favor of a wide extension of State rights, uses the following language, peculiarly applicable to the point now under consideration: 'Somewhat akin to the argument, it has been considered, is the objection that the deputy marshals authorized by the act of Congress to be created and to attend the elections, are authorized to keep the peace; and this is a duty which belongs to the State authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the Government of the United States, but belongs

exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded upon an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and, hence, to keep the peace to that extent.

“‘This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws, at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case the words of the Constitution itself show which is to yield: “This Constitution, and all laws which shall be made in pursuance thereof, shall be the supreme law of the land.”’ (100 U. S., 394-5.) And again: ‘The argument is based on a strained and impracticable view of the nature and powers of the government. It must execute its powers or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have the power to command obedience, preserve order, and keep the peace, and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its

jurisdiction.' (*Ib.* 396.) The power to keep the peace is a police matter, and the United States has power to keep the peace in matters affecting their sovereignty.

"There can be no doubt, then, that the jurisdiction of the United States is not affected by reason of the location where the homicide occurred. If the location is a necessary element of jurisdiction a majority of the offenses created by the statutes would be out of their jurisdiction and the statutes creating such offenses would be nullities and practically useless.

"For example, for a quarter of a century the United States courts in this State were held in rented buildings, owned by private parties. They had no jurisdiction over them under the provisions of section 8 of article 1 of the national Constitution, and no jurisdiction other than that had over portions of the country to which the constitution and its laws extended. Had an assault been committed in open court upon the judge in that building, and the assailing party been slain by the marshal in protecting the judge under circumstances to excuse or justify the homicide, would it be pretended that the court would have no jurisdiction to protect him from interference by the State government? Or have the United States and their courts no jurisdiction over the offense of resisting a United States marshal in the lawful execution of the process of the courts, or over the crime of counterfeiting the coin or forging the bonds or other securities of the United States, or other offenses against the laws, because the offense was not committed in a place under the exclusive jurisdiction of the United States? Such a claim would be simply preposterous.

“In the case of *Tennessee vs. Davis* the defendant was indicted for murder for killing one Haynes while he was engaged in discharging his duties as a deputy collector of internal revenue of the United States, and which killing, Davis claimed, was in self-defense. This case was removed to the Circuit Court of the United States, under section 643, R. S. It was contended that this act was an encroachment upon States' rights since it took away the right of the State to determine and execute its own criminal laws, and was therefore unconstitutional. The Supreme Court sustained the act. It is held ‘that the United States is a government with authority extending over all the territory of the Union, acting upon the State and the people of the State.’ In deciding the case the court said: ‘As was said in *Morton vs. Hunter* (1 Wheat., 363), the general government must cease to exist when it loses the power of protecting itself in the exercise of its constitutional powers. It can act only through its officers and agents, and they must act within the State. If, when acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court for an alleged offense against the laws of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection—if their protection must be left to the action of the State court—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the na-

tional government and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government, and even if, after trial and final judgment in the State court, a case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.

“The expositions of the territorial extent of the jurisdiction of the general government are authoritative and conclusive, and the result is that, whenever the Constitution and laws of the United States operate at all, the State laws in conflict with them are subordinate, and those of the United States supreme and paramount.

“‘We do not think that such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends, it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it.’—*Tennessee vs. Davis*, 100 U. S., 262–3.

There are numerous cases reported in the books where parties arrested for offenses under the State

ment; it brings the body of the prisoner up, together with the cause of his commitment. The court can, undoubtedly, inquire into the sufficiency of that cause.

. . . 'Warrants of arrest issued on the application of private informers, may show on their face a *prima-facie* charge sufficient to give jurisdiction to the justice; but it may be founded on mistake, ignorance, malice or perjury. To put a case very similar to the present, A tells B that he has seen C kill D; B runs off to a justice, swears to the murder boldly without any knowledge of the fact, and takes out a warrant for C, who is arrested and imprisoned in consequence thereof. C prays a writ of *habeas corpus* and shows that he was sheriff of the county, and hanged B in pursuance of a legal warrant. If a court could not discharge a prisoner in such a case, because the warrant is regular on its face, the writ of *habeas corpus* is of little use.'

"'The authority conferred on the judges of the United States by this act of Congress gives them all the power that any other court could exercise under the writ of *habeas corpus*, or gives them none at all. If under such a writ they may not discharge their officer when imprisoned, "by any authority," for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed. Is the prisoner to be brought before them only that they may acknowledge their utter impotence to protect him?' . . .

"In *Ex-parte* Robinson, Mr. Justice McLean held that 'a writ of *habeas corpus* may issue to relieve an officer of the Federal government who has been imprisoned for the performance of his duty.' (6 McLean,

355). In the course of the decision the learned justice observes: 'It is a general principle of law, to which I know of no exception, that the laws of every government shall be constructed by itself, and such construction is acted upon by the judiciary of all other countries. By the Federal Constitution, the judicial power of the United States is declared to be vested in one Supreme Court and in such inferior courts as the Congress may from time to time order and establish. Under this provision the judiciary of the Union gives the construction to the laws which is obligatory upon the State tribunals. The Constitution again declares: "The Constitution and laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."' (*Ib.*, 362.) Thus it is the exclusive prerogative of the national courts to finally determine whether an act performed by one of the officers of the United States, and especially an officer of the court, is 'done . . . in pursuance of a law of the United States,' or whether, when under arrest for acts performed in connection with his office, he is 'in custody in violation of the Constitution or of a law of the United States.' (2 Abb. 365.)

"In the case of *Roberts vs. Jailer*, Lafayette County, Kentucky, a special deputy United States marshal was arrested under the State laws, on a charge of murder for a homicide committed by him

in attempting to arrest one Cull upon a warrant issued by a commissioner of the United States Circuit Court, for offenses charged to have been committed under the internal revenue laws. Upon the hearing, the United States Circuit Court found that the homicide was committed in the performance of 'an act done in pursuance of a law of the United States, or of a process of a court or judge of the same,' and discharged the petitioner. The question of the jurisdiction of the court and the facts were elaborately discussed.

"So *in re* Ramsey, 2 Flippin, 45, the prisoner was a deputy United States marshal, in custody, by order of a State court on a charge of murder, the homicide having been committed in an attempt to arrest, upon a warrant issued by the United States courts, the party slain. The court found that the act was done in pursuance of a law of the United States; that petitioner was justified in the act which he performed, and discharged him. See also to the same effect *in re* Neill, 8 Blatch, 167; *in re* Farland, 1 Abb., 140; Electoral College of South Carolina, 1 Hughes, 571; *in re* Hunt, 2 Flip., 510. See cases collected in volume 29, Myers' Fed. Decisions 698. Thus it appears to be settled beyond controversy that, where a party is in custody of State authority for an act done or omitted to be done in pursuance of any specific provision of a statute of the United States imposing a duty upon him, or for an act performed justifiable by the circumstances of the case, in order to enable him to perform that duty, or in the execution of any order, or process, or decree of a court of the United States, or a judge thereof, the courts of the United

utes and the usages generally long recognized, are as much a portion of the laws of the United States as are the statutes themselves. So, also, where the statutes point out duties, provide for the accomplishment of many objects, or confer authority in general terms, they carry with them, by implication, all the powers, duties, exemptions, and authority necessary to carry out and accomplish all the purposes and objects intended to be secured thereby.

“Says the Supreme Court, in *Tennessee vs. Davis*, 100 U. S., 264, quoting with approbation from Chief Justice Marshall:—

“‘It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply without expressing this very exemption from State control.’ The collectors of the revenue, the carriers of the mail, the Mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of their duty. And yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which those institutions are created, and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument in administering this security.’

“If the officers referred to in the preceding pas-

they call upon the nearest constable for protection? Must they rely on him to use the requisite compulsion and to keep the peace, whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the position that they assume. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or, perhaps, some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old confederation.' (100 U. S., 395-6.)

"In this particular case the petitioner, long before he reached Lathrop, endeavored, through the conductor and the proprietor of the eating house at that place, to have 'a constable' in readiness on the arrival of the train to keep the peace, but without success. When too late to prevent the tragedy the constable appeared and arrested the petitioner for endeavoring to perform the duty which it is now claimed devolved exclusively upon himself or some other peace officer of the State.

"Had the United States in this instance relied upon another government—the State of California—to keep the peace as to one of their most venerable and distinguished officers—one of the judges of their highest court—in relation to matters concerning the performance of his official duties, they would have leaned upon a broken reed, and there would now in all probability be a vacancy on the bench of one of the most august judicial tribunals in the world, and the deceased

thus leaving him to pursue the remainder of his journey without protection? Yet the constable was informed that Neagle was acting as a deputy United States marshal, under the orders of his superiors, for the protection of the life and person of a justice of the Supreme Court of the United States.

“We do not wish to be regarded as now calmly and deliberately looking back upon the scene and sitting in judgment upon the action of the constable, or as passing censure upon his zeal. He doubtless, in the emergency, where time for consideration was short and the facts not fully appreciated, acted according to the best dictates of his necessarily hastily-formed judgment. But when the State now comes after an arrest upon a warrant issued upon such flimsy testimony as that presented, and deliberately claims the exclusive right to sit in judgment upon the acts of the United States deputy marshal, performed, not upon his own interpretation of the law, but upon that of the attorney-general of the United States, who may be presumed to possess some knowledge of his powers and duties, it is well to consider the circumstances from a standpoint presenting a view of both sides of the question.

“In the matters of the public peace, in which the national government is concerned, the marshals and deputy marshals, within the scope of their authority, are national peace officers, with all the statutory and common law powers appertaining to peace officers. Is not the national public peace involved when a deadly assault is unexpectedly made upon the judge in open court, in which the marshal and his deputies, seeing the assault, are both authorized and bound on their

own motion, without any previous order or command, to interpose, and use sufficient force to quell the disturbance and subdue the parties making it? Yet where is there any specific provision of the statute imposing that duty upon them? The marshal is required to attend court, but it is not provided what he shall do in court. To what end shall he be in court if not to keep order, and if necessary to protect the judges from violence, by force or any other necessary practicable means? But there is no statute requiring it in terms.

“The general duties of marshals are provided for in section 737, which reads as follows: ‘It shall be the duty of the marshal of each district to attend the District and Circuit Courts when sitting therein and execute throughout the district all lawful precepts directed to him and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty.’ There is no more authority specifically conferred upon the marshal by this section to protect the judge from assassination in open court, without a specific order or command, than there is to protect him out of court when on the way from one court to another in the discharge of his official duties. And the assassination in court, as well as out, might well be accomplished before the judge would be aware of his danger, and before it would be possible to give a command or order to the marshal for his protection. The authority exists in the one case, as well as the other, from the nature of the office and the powers arising under the common law, recognized and in use in the country, and in the nature of things inherent in the office.

The very idea of a government composed of executive, legislative, and judicial departments necessarily comprehends the power to do all things through its appropriate officers and agents, within the scope of its general governmental purposes and powers requisite to preserve its existence, protect it and its ministers, and give it complete efficiency in all parts. It necessarily and inherently includes power in its executive department to enforce the laws, keep the national peace with regard to its officers while in the line of their duty, and protect by its all-powerful arm all the other departments and the officers and instrumentalities necessary to their efficiency while engaged in the discharge of their duties.

“In language attributed to Mr. Ex-Secretary Bayard, used with reference to this very case, which we quote, not as a controlling judicial authority, but for its intrinsic sound, solid, common sense: ‘The robust and essential principles must be recognized and proclaimed, that the inherent powers of every government which is sufficient to authorize and enforce the judgments of its courts are equally, and at all times, and in all places, sufficient to protect the individual judge who fearlessly and conscientiously in the discharge of his duty pronounces those judgments.’

“Our system of jurisprudence is derived from and founded upon that of England, and our judges and officers are substantially the same. They have corresponding duties imposed upon them, and are inherently invested with corresponding executive powers, to enable them to effectively perform their duties. Many of their common-law duties have been per-

formed, and common-law powers have been exercised without specific or statutory direction, and without question from the foundation of our government, and the common-law principles governing them, except so far as inapplicable or modified by statute, still remain in force.

“The observation of the Supreme Court of California in the estate of Apple, 66, Cal., 431, in which State a code has been adopted with respect to the common law not abrogated or modified by the code is applicable here. Said the court: ‘The code establishes the law of this State respecting the subject to which it relates; but this of course’ does not mean that there is no law with respect to such subjects except that embodied in the code. When the code speaks its provisions are controlling, and they are to be liberally construed with a view to effect its objects and promote justice—the rule of the common law that statutes in derogation thereof are to be strictly construed having been abolished here—but where the code is silent the common law governs.’ So here, where the duties of the marshal are not limited or specifically defined by the statute, we must look to the power and duties of sheriffs at common law for them so far as those duties come within the purpose and powers of the national government.

“There are many acts and duties daily performed by the marshals, and by other officers, that are not specifically pointed out or defined by the statute. The marshals are in daily attendance upon the judges and performing official duties in their chambers. Yet no statute specifically points out those duties or requires

their performance. Indeed, no such places as chambers for the circuit judges or circuit justices are mentioned at all in the statutes. The judges' chambers do not appear to have any 'local habitation'. The justices of the Supreme Court at Washington have, in fact, no chambers otherwise than as they study and do their work out of court at a room in their own residences. We have in the San Francisco courthouse rooms that we call chambers, in which the work of the judges out of court is in part, but not all, performed. I apprehend that the marshal would as clearly be authorized to protect the judges here in chambers as in the court room. All business done out of court by the judge is called chamber business. But it is not necessary to be done in what are usually called chambers. Chamber business may be done, and often is done, on the street, in the judge's own house, at the hotel where he stops when absent from home, or it may be done in *transitu*, on the cars in going from one place to another within the proper jurisdiction to hold court. Mr. Justice Field could as well and as authoritatively issue a temporary injunction, grant a writ of *habeas corpus*, an order to show cause, or do any other chamber business for the district in the dining room at Lathrop or in the cars as at his chambers in San Francisco or in the court room. He could have made a writ of *habeas corpus* returnable before himself on the car and lawfully heard and decided the case while on his passage to San Francisco. The chambers of the judge, where chambers are provided, are not an element of jurisdiction, but are a convenience to the judge and to suitors, where the

for the safety of the judges, and it has fallen into desuetude. But it does not follow that the power to thus protect them has been abolished, or become extinguished. It simply remains latent, ready to be called into action whenever the exigencies of the case or times require it. And how could there possibly be a more urgent occasion for reviving the practice than the recent journey of Justice Field to Los Angeles and return on official business?

“Upon general, immutable principles, the power must be necessarily inherent in the executive department of any government worthy the name of government, to protect itself in all matters to which its authority extends; and this necessarily involves the power to protect all the agencies and instrumentalities necessary to accomplish the objects and purposes of that government. In the national government of the United States the judiciary constitutes one, at least, of its most important branches. Unlike the judiciary of other nations, it is invested with the jurisdiction to pass, finally and conclusively, upon the powers of the legislative and executive departments of the government and to confine them within their constitutional limits. It is, therefore, the balance-wheel of the national government that keeps it running regularly and smoothly in its proper channels. Impotent, indeed, must be the executive branch of the government if it is not empowered to protect the lives of the judges of the highest branch of this judiciary from assault and assassination, on account of their judicial decision, by desperate, disappointed litigants, while passing from point to point within their territorial jurisdiction,

in the discharge of their high functions and duties. We cannot think the power can be wanting, even if there were no constitutional or statutory provision governing the case. It seems impossible that the national government should be left to the mercy, good will, or complacency of the State, to afford that protection to its judges that the United States, if worthy to be called a nation, are bound themselves to furnish.

“But we are not without constitutional and statutory provisions, broad enough and specific enough, as we think, to cover the case. The national Constitution, providing a government for 65,000,000 of people, covers a very few pages; but it seems to be amply sufficient for the purposes intended. In prescribing the duties of the President, in the terse but comprehensive language of section 3 of article 2, it provides that ‘he shall take care that the laws be faithfully executed.’ This makes him the executive head of the nation and gives him all the authority necessary to accomplish the purpose intended—all the authority necessarily inherent in the position, not otherwise limited. Congress, in pursuance of powers invested in it, has provided for seven departments, as subordinate to the President, to aid him in performing the executive functions conferred upon him. Section 346 R. S. provides that ‘one of the executive departments shall be known as the Department of Justice,’ and it provides that there shall be ‘an attorney-general, who shall be the head thereof.’ He has general supervision of the executive branch of the national judiciary, and section 362 provides as a portion of his powers and duties ‘that the attorney-general shall exercise general

superintendence and direction over the attorneys and marshals of all the districts in the United States and Territories as to the manner of discharging their respective duties, and the several district attorneys and marshals are required to report to the attorney-general an account of their official proceedings and of the state and condition of their respective offices, in such time and manner as the attorney-general shall direct.' Section 788 R. S. provides that 'the marshals and their deputies shall have in each State the same powers in executing the laws of the United States as the sheriffs and their deputies may have by law in executing the laws thereof.' By section 817 of the penal code of this State the sheriff is a 'peace officer.' By section 4170, political code, he is 'to preserve the peace' and 'prevent and suppress breaches of the peace.' The marshal is, therefore, in accordance with the decision of the Supreme Court already referred to, and under the provisions of the statute above cited, a 'peace officer,' so far as keeping the peace in any matter wherein the national powers of the United States are concerned, and as to such matters he has all the powers of a sheriff as a peace officer under the laws of the State. He is, in such matters, 'to preserve the peace,' and 'prevent and suppress breaches of the peace.' An assault or an assassination of a judge of the United States court, while engaged in any matter pertaining to his official duties, on account or by reason of his judicial decisions, is a breach of the peace affecting the authority and interests of the United States, and within the jurisdiction and power of the marshal or his deputies to prevent as a

peace officer of the national government. An assault upon Mr. Justice Field, while engaged in and by reason of the discharge of his judicial duties, is not merely an assault upon his person as a man. It is an assault upon the national judiciary, which he represents, and through it an assault upon the authority of the nation itself. It is necessarily a breach of the national peace. As a national peace officer under the conditions indicated, it is the duty of the marshal and his deputies to prevent a breach of the national peace by the assault upon the authority of the United States in the person of a judge of its highest court while in the discharge of his duty. If this is not so, in the language of the Supreme Court before cited, 'Why do we have marshals at all?' What useful functions can they perform in the economy of the national government?

"The Constitution of the United States provides for a Supreme Court, with jurisdiction more extensive in some particulars than that conferred on any other national judicial tribunal. If the executive department of the government cannot protect one of these judges while in the discharge of his duty, from assassination by disappointed suitors on account of his judicial action, then it cannot protect any of them, and all the members of the court may be killed and the court itself exterminated, and the laws of the nation, by reason thereof, remain unadministered and unexecuted. The power and duty imposed on the president to 'take care that the laws are faithfully executed' necessarily carries with it all power and authority necessary to accomplish the object sought to be attained, and, certainly, the power and duty to

protect from the deadly assaults of desperate suitors the lives of the judges of the highest court in the nation, while engaged in the lawful discharge of their duties.

“As we have before seen, neither Constitution nor statutes can or do anticipate and point out, specifically, every possible right or duty to be covered and secured. They must necessarily be general. In the passage already cited, from *Tennessee vs. Davis*, the Supreme Court, in speaking of certain officers, says: ‘It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which those institutions are created, and is secured to the individuals employed by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security.’ (100 U. S., 265.) And in *United States vs. McDaniel*, 7 Pet., 14, similar views were expressed. Said the court: ‘A practical knowledge of the action of any of the great departments of the government must convince every person that the head of a department in the distribution of its duties and responsibilities is often compelled to exercise his discretion. He is limited in the exercise of his powers by law; but it does not follow that he must show a statutory provision for every act he does. No government could be administered on such principles. There are numberless things that neither can be anticipated nor defined, and which are essential to the proper action of the government.’ These observa-

tions are especially and forcibly applicable to the terse but very comprehensive provisions of the Constitution and of the several statutes cited, as to the powers and duties of the President, the attorney-general, and the marshals.

“The act of the attorney-general in directing the United States marshal to protect the life of Mr. Justice Field against the assaults of the deceased and his wife are in legal contemplation the act of the President. The President speaks and acts through the head of the several executive departments in relation to subjects which appertain to their respective duties. They are but the subordinates of the President, wielding his power. (*Wilcox vs. Jackson*, 13 Pet., 513; *U. S. vs. Cutter*, 2 Curtis, 617.)

“In the former case, relating to a reservation of land by the Secretary of War, the court said: ‘Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to their respective duties.’ See also 7 Atty.-Gen. Opinions, 480-1; *Ib.*, 433-479; Confiscation Cases, 20 Wal., 108-9; *U. S. vs. Ellason*, 16 Pet., 93.

“By section 788, revised statutes, and the several provisions of the statutes of California there cited, the United States marshal is made a peace officer, and as such he is authorized to preserve the peace, so far as a breach of the peace affects the authority of the United States and obstructs the operations of the government and its various departments. The courts

must, from the nature of things, be enabled fully to perform all their functions imposed upon them by the Constitution and laws without hindrance or obstruction, and they must have the inherent power to protect themselves by and through their executive offices, under the direction and supervision of the attorney-general and President, against obstruction and hindrance in the performance of their judicial duties. An assault upon a judge in court or a judge out of court, while in the performance of his duty, induced by his judicial action and intended or calculated to obstruct him in or deter him from a free and full discharge of his duty, is a breach of the national peace, affecting the sovereignty of the nation so conferred upon him, and as a national peace officer to prevent such breach of the peace. Under the State laws deputy sheriffs, when occasion requires, constables and police officers of cities are assigned to certain districts, to watch over the safety of the citizens and to guard and protect their persons and property from assault, destruction or injury—in short, to prevent crimes, etc. These officers in cities are found everywhere, night and day, guarding the citizen and his property from injury. So the attorney-general, under the provisions in the statute cited, and the President, under the provisions of the Constitution, requiring him to see that the laws are faithfully executed, are authorized and empowered to direct the assignment by the marshal of any deputy to perform any special national police duty within his jurisdiction arising out of the statutes, whether by express provision or necessary implication, and under any power necessarily inherent in the President and

journey in discharge of his duty does a complaint now come with a good grace from the State against the United States for performing it for her, as well as for the national government, by protecting one of their most distinguished judicial officers through one of their own officers in the only manner in which it could have been effectively performed?

“In the present case, and on this official journey, there was a necessity for the kind of protection afforded Mr. Justice Field, for no other kind would have been adequate. The occasion required a preventive remedy.

“The use of the State police force would have been impracticable, as the powers of the sheriff would have ended at the borders of his county, and of other township and peace officers at the boundaries of their respective townships and cities. Only a United States marshal or his deputy could exercise those official functions throughout the United States judicial district, and, as we have seen, the powers exercised concerning matters affecting the peace of the national government, and if the national government has no authority to act in the premises it certainly ought to have such power.

“The only remedy suggested on the part of the State was to arrest the deceased, and hold him to bail to keep the peace, under section 706 of the penal code, the highest limit of the amount of bail being \$5,000. But, although the threats are conceded to have been publicly known in the State, no State officer took any means to provide this flimsy safeguard.

“Perhaps counsel intended to intimate that it was not the duty of the State, but of Mr. Justice Field himself, to set in motion proceedings under the law furnished by the State to put the decedent under bonds to keep the peace. Has it come to this, then, that a justice of the Supreme Court of the United States, when, in obedience to the behests of the law, he comes to California to perform his exalted judicial duties, must submit to the humiliation, immediately on his arrival, of stealing away to some justice of the peace and instituting proceedings to bind over to keep the peace, violent and dangerous litigants, who have threatened his life? But what security to Mr. Field would a bond of \$5,000 afford against resolute, violent and desperate parties, for whom the penalties for murder have no deterring power? The United States marshal, the United States attorney for the district of California, the attorney-general of the United States at Washington, and the mass of the people of California, thought that the exigencies of the occasion required something more, and the result fully justified their view of the matter.

“Although no adequate means of protection were afforded by the State on his late official journey, and Mr. Justice Field would, in all probability, not now be among the living, had not the petitioner, by the wise forethought of the attorney-general, been detailed to protect his life, yet these facts do not afford any reason for taking him out of the custody of the State, unless in committing the homicide he was engaged in the performance of ‘an act done . . . in pursuance of a law of the United States,’ and the killing

was justifiable. These facts alone would not oust the jurisdiction of the State, if it be exclusive. But since the possible remedy mentioned under the State law was alluded to by counsel as ample, we refer to it as illustrating the necessity for a speedy amendment of the laws of the United States, if they are now so defective as to afford no protection to the United States judges in the performance of their high functions.

“It seems apparent to us, if he is not now so protected, that the distinguished justice allotted to the ninth circuit, and also his associates, should have thrown around them the protecting ægis of the laws of that government, which he has so long faithfully, laboriously, ably, and efficiently served.

“After mature consideration we have reached the conclusion that the homicide in question was committed by petitioner while acting in the discharge of a duty imposed upon him by the Constitution and laws of the United States, within the meaning of the provisions of section 753 of the revised statutes.

“It only remains to inquire, secondly, was the homicide necessary, or was it reasonably apparent to the mind of the petitioner, at the time and under the circumstances then existing, that the killing was necessary, in order to a full and complete discharge of such duty?

“The answer to this proposition is really included in the answer to the last, but we desire to make some observations bearing especially upon it.

“The attorney-general and counsel for the State declined to discuss the question as to whether the homicide was justifiable, because in their view this

two preliminary blows, doubtless by way of reminding him that the time for vengeance had at last come, Justice Field was already at the traditional 'wall' of the law. He was sitting quietly at a table, back to the assailant, eating his breakfast, the side opposite being occupied by other passengers, some of whom were women, similarly engaged. When in a dazed condition he finally awoke to the reality of the situation, and saw the giant form of the deceased with arm drawn back for a final mortal blow, there was no time to get under or over the table, had the law under any circumstances absurdly required such a performance for his justification. Neagle could not see a 'wall' to justify his acts without abandoning his charge to certain death. When, therefore, he sprang to his feet and cried, 'Stop! I am an officer!' and saw the powerful arm of the deceased drawn back for the final deadly stroke, instantly change its direction to his left breast, apparently seeking his favorite weapon, the knife, and at the same time heard the suppressed, disappointed growl of recognition of the man who, with the aid of half a dozen others, had finally succeeded in disarming him of his knife at the court room a year before, the supreme moment had come—or, at least, with abundant reason, he thought so, and fired the fatal shot. The testimony all concurs in showing this to be the state of facts, and the almost universal *consensus* of public opinion of the United States, as mirrored in the press, resting upon reports no more favorable to petitioner than the evidence taken in this case, justifies the act. On that occasion, a second or two seconds signified at least two valuable lives, and a reasonable degree of

prudence would justify a shot one or two seconds too soon rather than a fraction of a second too late.

“We have seen some adverse criticism upon the action of petitioner attributed to quarters ordinarily entitled to great consideration and respect. But it is not for scholarly gentlemen of humane and peaceful instincts—gentlemen who, in all probability, never in their lives saw a desperate man of herculean proportions and strength, in murderous action—it is not for them, sitting securely in their libraries three thousand miles away, looking backward over the scene, to determine the exact point of time when a man in Neagle’s situation should fire at his assailant in order to be justified by the law. It is not for them to say that the proper time has not yet come. To such, in all probability, the proper time would never come. Neagle, on the scene of action, facing the party making a murderous assault, knowing by personal experience his physical powers and his desperate character, and, by general reputation, his lifelong habit of carrying arms, his readiness to use them, and his angry murderous threats, and seeing his demoniac looks, his stealthy assault upon Justice Field from behind, and remembering the sacred trust committed to his charge—Neagle, in these trying circumstances, was the party to determine when the supreme moment for action had come, and if he honestly acted with reasonable judgment and discretion the law justifies him, even if he erred. But who will have the courage to stand up in the presence of the facts developed by the testimony in this case and say he fired the smallest fraction of a second too soon?

"In our judgment, he acted, under the trying conditions surrounding him, in good faith and with consummate courage, judgment and discretion. The homicide was, in our opinion, clearly justifiable in law, and, in the forum of sound, practical common sense, commendable.

"Let the petitioner be discharged.

"September 16, 1889.

"SAWYER, *Circuit Judge*.

"SABIN, *District Judge*."

CHAPTER LI.

REFLECTIONS ON NEAGLE'S DISCHARGE—ADVERSE CRITICISM ON THE CHARACTER OF TERRY—HOW HE WAS ESTIMATED BY EASTERN PEOPLE.

The remarkable document which is presented in full in the preceding chapter, so elaborate in detail, so voluminous in extent and research, and so unique in design, suggests the estimate placed upon Justice Field by David S. Terry, that he could present the most plausible reasons for a bad decision of any man that ever occupied the bench. The narration of facts is of that peculiar type which creates a measure of doubt in the mind of the reader when compared with the evidence offered by so many others not directly interested in the case. There were no objections offered to the discharge of Deputy Neagle, but the manner in which it was done was the subject of severe and just criticism. It was one of those peculiar cases where a murder had been committed and there was no murderer on the surface. The skirts of the armor-bearer of Justice Field would have been more clean and much whiter had he insisted upon a trial and been declared not guilty than to be set at liberty by the court against which the offense had been committed without a trial, as he would most certainly have been acquitted. It was the revelations which must necessarily follow a court of inquiry which suggested the peculiar method that was resorted to.

The summary removal of a "border ruffian" of the "fire-eating" type was termed an act of "consummate skill," and that "border ruffian" one of the higher order; one of the most eminent, dignified and grand. He almost dignified the profession to which he belonged as gauged by his best enemies. One of them, a brother Democrat of the "other school," who edited the *Placerville Observer*, feeling secure over the new-made sod that covered the body of the "criminal," paid his farewell respects in the following well-chosen words, and with a spirit that invites the charity of men and the pity of angels. He drops into camp-fire reminiscences with prodigality and blurs the truth with a relish that is truly refreshing. As ordinary newspapers seldom survive one moon, it is fitting that this production be preserved to enlighten future generations, and teach them that the most elegant language can be employed by a prejudiced mind to evolve the most superb ignorance and falsehood in order to unite with the cowardly chorus that did homage to the power of wealth and corruption:—

"The timely official shot which killed David S. Terry, arrested and avenged a brutal assault, characteristic of the assailant. It closed a criminal career, distinguished by shameless infamies. The cold-blooded blackguard belonged to a class of treacherous and brutal ruffians, who, unwept and unregretted, are passing rapidly away. His fate is bewailed by none but his boon companions, and a few surviving confederates in successive conspiracies against society and government. Hence the universal verdict of decent people and of the press, which reflects their senti-

ments, will be, and is, that his sudden and inglorious death was caused by a drastic dose of his own medicine.

“The doom he invited and deserved was only too long deferred. Dust to dust, earth to earth, and peace to his ashes. Let the other darkness into which he has passed cover venal sins and the average of human vices. Let ‘time’s half brother’ condone such faults and frailties as are inherent in human nature. Let the sepulchral voice and hollow laughter which were the echoes of a heart dead to all the better sentiments and aspirations of humanity be heard no more forever. But while charity with averted face and mental reservations consigns him to an ignoble grave, it is the office of that even-handed justice, to which he has forfeited his criminal life, to make it a warning example for all time to come.

“But why expose the shameless audacity of the blackguard who sought, with favorable opportunities, to make his crimes conspicuous? From his first war whoop in border fray to the last crowning infamy of his diabolical and disreputable life, he was a predatory soldier of fortune, intent upon the bad eminence he attained. With the treachery of an Apache Indian, he had the courage which comes from the ‘trick of the weapon’ and superior physical strength. In the cold-blooded and vindictive conspiracy to hunt down and kill the gallant Broderick, he sported a ‘shield blazoned with the name of chivalry to cover the crime of murder.’ The sectional and sinister motive of the hair-triggered conspiracy to kill the organizing and representative leader of the Douglas Democracy is well known. ‘I die,’ he said, ‘because I was opposed

to a corrupt administration and the extension of slavery.' But the dead hero was mightier than the living assassin. From Lone Mountain to the avenging heavens the moral and fighting forces of the universe were proclaiming the coming triumph of the good cause for which he died.

"With the hanging mark of Cain upon him, the apostate judge, who never felt nor feigned a moral obligation or loyal sentiment, withdrew from subordinate conspiracies against Northern men and institutions in California, to join a more gigantic confederacy against the nation. Having shared the crimes and husks of the rebellion and tarried for the benefit of robust health two years in Mexico, he returned to this State, in whose penitentiary he should have spent the seven years of his absence. He came back a sadder and sourer, but not a better man.

"The heart that broke when the Rebellion went down before the eagles of the republic, was still in arms against the people and their government. The rancorous and remorseless rebel, embittered by defeat and torn by the vulture of disappointment, was still a false and faithless unbeliever in the force that crushed him. The red-handed conspirator against the peace and dignity of the State, when remanded for past offenses to social and political ostracism, if less hopeful and confident, was more morose and malignant. By his prurient marriage of an adventuress, better than himself, he had gained a loss of antenuptial friends and fortune. And when the coveted millions of her departed paramours went glimmering from sight, her last suitor and first husband had nothing to

show for love or luck but the charming Sarah Althea herself. Hence the concerted cry of disappointed rage with which all the suits against Sharon, for love or money, were consolidated in one deadly, double-barreled, breech-loading, self-cocking case of aggravated insult, slander and violence against courts and judges. With just this case and no other provocation than his own nastiness, the brutal and shameless blackguard who assaulted Judge Field, crossed the inviolable circle which conserves the independence and security of judges and courts, and messengers of death exchanged horses to tell how a brave officer avenged the wrong.

"The riddle and irony of fate never looked so much like the compensations of divine justice. While the deathless name and memory of David C. Broderick are spell words of honor and slogans of honor, those of the notorious Terry are synonyms of shame and silent contempt. Of all the courts and civic societies that vied with each other in respectful homage to the dead lion, not one has condescended to notice the dismal death and burial of his slayer. It is not now the estate of Sharon that is to be despoiled and wasted, but the less tempting one of Terry is to be the dry bone of contention. The disloyal and diabolical conspiracies for pelf and power, in which the mercenary and murderous Terry warred upon individual life, social order and good government, are blackening in the winds that winnow fragrance on the monumental shrine of Broderick, and pay loving homage to the 'flag of the free and the home of the brave.' And now that the bully and blackguard who courted his fate has expiated

his criminal aspersions and assaults upon learned, dignified and venerable judges, their untarnished lives and reputations are in the safe-keeping of the States and nation they have served so long and well—an imperishable heritage of virtue, justice and honor.”

The Chicago *Mail*, a representative newspaper of the great West, with commendable care and intelligence, presented the following to its readers at the time of Terry's death. With a few exceptions, it is a fair presentation of the facts, briefly told:—

“When the story of the life of Sarah Althea Hill-Sharon-Terry is written—if it ever should be—it will be the history of a trouble-maker. She began by leading Senator Sharon a chase which ended in his demise. She had worried the weak millionaire for years before death—largely hastened by her attacks on him in the courts and in the press—ended his part in the fight. But the woman—one of those fierce natures that are frequently found in the southern countries of Europe, but rarely in America—continued the struggle with the dead man's heirs. Into her net she drew Judge Terry, her counsel, and they were married. He was just the ally she wanted—a typical Western fire-eater, as hot-blooded as herself, as vengeful, as unrelenting in his hatred, and, withal, a duelist who had killed his man.

“With this man under her thumb Sarah Althea fought unceasingly for Sharon's wealth, and when a decision was rendered against her became so abusive that Judge Field was compelled to order her removal from the court room. This precipitated a disgraceful row, in which Terry drew a murderous knife and at-

out of place in our modern industrial and busy communities as a tiger in a barnyard. The whole tribe owed their existence to the inordinate value attached in the South, in the slavery days, to personal courage as one of the social virtues, and which they accordingly soon learned to use as a cover for every variety of social defect—drunkenness, quarrelsomeness, idleness and general business untrustworthiness. They had, in fact, to be quarrelsome in order to bring their peculiar virtue into play and make it tell on their social standing; but it was a virtue which, of course, has comparatively small value in any community in which the administration of justice is efficient and the police reasonably vigilant.

“Terry’s death reminds us forcibly of the changes all parts of the country—New York, as well as the Southern States and the Pacific Coast—have undergone since he rose into fame by killing Broderick. Broderick, though a man of good character and considerable ability, was simply a ward politician and saloon-keeper and the foreman of a fire company when he emigrated from New York to California, and yet his death convulsed the public in New York as a great political calamity. But the community which was convulsed was not shocked by seeing one of the most notorious ruffians of the day—the leader of more than one riot—Isaiah Rynders, occupying the place of United States marshal, and gave Bill Pool, a political pugilist killed in a bar-room fight, one of the most imposing funerals ever seen in the city.

“Terry was, in fact, in his beginnings a man of his time, but must have felt himself ever since the war

CHAPTER LII.

CONCLUSION.

The story is told. There could probably be much added if the man had been more generous with his personal history, but he was selfish in that respect. He was one of the few men who have been endowed with great abilities that despised adulation. He did not believe in praise for the performance of duty. It may have been sufficiently uncommon for men to do their duty under any and all circumstances to be entitled to commendation and praise, but that was not his idea of manhood. As David S. Terry emerged from youth to manhood he carried with him a high principle of honor and dignity. He was subject to the most dangerous influences in the passage, and, whether natural or acquired, he was domineering and rough in his contact with the world. He was in many ways generous, but not in charity toward those who were weak in either intellect or courage. He had no patience with the man who could compromise his honor in any manner for any purpose. He was a stern and relentless enemy of every phase of deceit. His experience in the rough walks of life, when coming in contact with those who were pushing to the front armed with hypocrisy, was sensational. There was an element in his nature which antagonized all the arts that were common to the ordinary place-seeker.

His convictions were strong, and as he was wedded to the principles of slavery, he took the most radical view of that subject. He was not in a natural element after the Civil War, and he yielded reluctantly to what he denominated the power of force in national affairs.

He was one of the men of brain and force whose names are inseparable from the early history of California. He was an able, implacable, courageous, vindictive and desperate man; but he was one of the best constitutional lawyers in the State. Those who lived in the times preceding the Civil War, when border troubles in Kansas and Missouri, were quite common, can appreciate the extreme virulence with which the partisans were ranged on either side, and which finally culminated in the Civil War. It was such a temper that led to the celebrated duel and marked an era in California's history. The friendship that had existed in former years was forgotten in that hour.

His great ability and indomitable courage were sufficient to insure his professional success, however dark the horizon of his political fortunes may have become. At the ripe age of sixty-six his mental faculties were not dimmed nor his physical vigor impaired. He stood, as for a quarter of a century longer he might have stood, at the head of his profession in the great valley of the San Joaquin, and the peer of his associates at the California bar. Destruction came upon the ex-chief justice in the form of the heroine of the great Sharon scandal. As one editor has said: "Friends of the dead jurist—and he had many and strong ones—would resent, perhaps, even an allusion to his admitting failings; but they will not have the hardihood

to deny that his marriage with Miss Hill was an insult to them and to the memory of the mother of his children, and a menace to society. That marriage compassed the judge's ruin."

The Sharon case is as much a mystery to-day as it was the day it was first instituted. It was never decided intelligently, and never can be. The documents are voluminous, but the most impressive and convincing one is Judge Terry's arraignment of the Supreme Court in his argument on motion for a rehearing. His death ended it. It is only just to his memory to say that he believed in the righteousness of his client's cause, but his marriage with her doomed him to inevitable ruin. In view of his reputation as a desperate man and his reported threats the servants of the government were perfectly safe in killing him when wreaking vengeance on Justice Field. It was the audacity of the deed in slapping Field's face, and not the fact that he was shot down without warning, that challenged the attention of the world. There was nothing out of the ordinary in the killing, but the exhibition of contempt displayed in the attack upon Field was the act that created consternation and surprise.

After the release of Neagle on *habeas corpus* he was congratulated by the Federal appendages. As soon as Judge Sawyer had concluded the reading of the decision, the people present repaired to the office of the United States marshal, and from there to the judge's chambers, where he was presented with a massive gold watch and chain by Justice Field, which was accompanied by a few remarks. This outward and public

show of reward had inscribed upon it the words: "Stephen J. Field to David Neagle, as a token of appreciation of his courage and fidelity to duty under circumstances of great peril at Lathrop, Cal., on the fourteenth day of August, 1889."

With the foregoing biography and history as the result of months of hard and honest labor, having in view solely and singularly a desire to present nothing but the facts, with a due regard to the virtues and vices of the dead and justice to the living, the writer will ask the charity of critics in reviewing it as a literary production, but invites special attention and respectful consideration as to the facts set forth.

